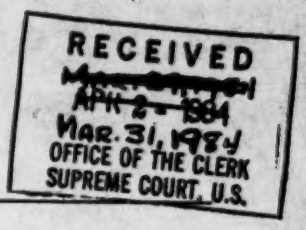
No. 83-6610

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983



MARGIE BULLARD BARFIELD,

Petitioner,

v.

KENNETH W. HARRIS, Superintendent, North Carolina Correctional Center for Women, and RUFUS L. EDMISTEN, State of North Carolina,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the instruction to petitioner's jury -- the "legislature ... has established and declared that where a murder was committed by means of poison [as here] that premeditation and deliberation are deemed to exist" -- so completely removed the element of intent from the jury's consideration that petitioner was prejudiced under either of the conflicting views expressed in Connecticut v. Johnson, ___U.S.___, 103 S.Ct. 969 (1983)?

2. Whether petitioner's penalty trial instructions created the risk, unacceptable under the eighth amendment, that the death penalty was imposed in spite of factors which may have called for a less severe penalty, because the instructions may have permitted the jury not to consider mitigating circumstances in making the ultimate determination that death was the appropriate punishment for petitioner?

3. Whether the states may be permitted to exclude a prospective juror under the strictures of Witherspoon v. Illinois, 391 U.S. 510 (1968), if that juror's most unequivocal assertion of his or her inability to consider the imposition of a death sentence is, "I don't believe I could"?

4. Whether petitioner's claim of ineffective assistance of counsel -- which is virtually identical to the claim pending resolution by the Court in Strickland v. Washington, ___U.S.___, 103 S.Ct. 2451 (1981) -- requires at least a new sentencing trial?

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Petitioner, MARGIE BULLARD BARFIELD, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit filed October 3, 1983. Rehearing was denied on November 22, 1983.

CITATION TO OPINION BELOW

The opinion of the court of appeals is reported at 719 F.2d 58 (4th Cir. 1983), and is set out at pages 1a-6a of the Appendix.[1] The order denying rehearing is set out at App. 7a.

JURISDICTION

The judgment and opinion of the court of appeals were filed on October 3, 1983, and petitioner's timely petition for rehearing was denied on November 22, 1983. By order of the Court, petitioner's time for filing a petition for writ of certiorari was extended to March 31, 1984. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense;

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[1] Citations to the Appendix accompanying this petition are designated App. ___.

the eighth amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law....

It also involves N.C. Gen. Stat. §§15A-2000 through 15A-2003, set out at App. 8a-11a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

On March 28, 1978, the grand jury of Robeson County, North Carolina, returned an indictment charging the petitioner with the murder of Stewart Taylor (RA. 15-16).[2] Thereafter, the venue of petitioner's case was transferred to Bladen County, North Carolina, and petitioner was tried between November 27, and December 2, 1978, in the Superior Court of Bladen County. (RA. 56-53, 4-12) On December 2, 1978, Ms. Barfield was convicted of one count of first degree murder and was sentenced to death.

On November 6, 1979, the Supreme Court of North Carolina affirmed Ms. Barfield's conviction and death sentence. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979). (App. 12a-46a) Certiorari was thereafter denied on June 30, 1980. Barfield v. North Carolina, 448 U.S. 907 (1980).

On October 3, 1980, Ms. Barfield filed a motion for appropriate relief in the Superior Court of Bladen County. Venue was transferred to the Superior Court of Robeson County, and on November 26, 1980 the Superior Court denied Ms. Barfield's

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[2] For purposes of this petition, the following abbreviations will be used to designate the various parts of the record in petitioner's case:

- "T" -- transcript of petitioner's trial in Bladen Superior Court;
- "RA" -- record on direct appeal to the Supreme Court of North Carolina;
- "MT" -- transcript of the hearing on petitioner's Motion for Appropriate Relief in Bladen Superior Court.

motion. (App. 47a-83a) Thereafter, a petition for writ of certiorari to review this judgment was filed in the Supreme Court of North Carolina, and on July 8, 1981, the court denied the petition. (App. 84a) Certiorari was denied in connection with the state post-conviction proceedings, on October 19, 1981. Barfield v. North Carolina, 454 U.S. 957 (1981).

Following her exhaustion of state remedies, Ms. Barfield filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. Pursuant to the stipulation of the parties, the District Court incorporated the entire transcript of the evidentiary hearing in state post conviction proceedings into the federal record and entered de novo fact findings on the basis of this record. On May 21, 1982, the District Court denied Ms. Barfield's petition for writ of habeas corpus. Barfield v. Harris, 540 F.Supp. 451 (E.D.N.C. 1982). (App. 85a-111a) An appeal was thereafter perfected to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court on October 3, 1983, Barfield v. Harris, 719 F.2d 58 (4th Cir. 1983) (App 1a-6a), and denied rehearing on November 22, 1983 (App. 7a).

B. Material Facts

The prosecution's case at trial showed that prior to and on January 31, 1978, Ms. Barfield and Stewart Taylor were going together and occasionally lived together in Mr. Taylor's home in St. Paul's, North Carolina. (T. 324-325) Until January 31, 1978, Taylor, who was then 56 years old, had been in good health. (T. 325) During the night of January 31, 1978, however, Taylor became ill with flu-like symptoms (T. 326-327), and over the course of the next three days, became increasingly more ill. (T. 328-329) Finally, on the night of February 3, 1978, Taylor was taken by ambulance to a hospital in Lumberton, North Carolina, where he died at approximately 9:40 P.M. (T. 310-312) An autopsy conducted after Taylor's death revealed that the cause of death was acute arsenic poisoning (T. 364-365).

The remainder of the prosecution's case rested entirely upon confessions made by Ms. Barfield to the Taylor homicide and to other poisoning homicides, and upon the facts concerning the other homicides allegedly committed by Ms. Barfield.

Prior to trial, Ms. Barfield admitted having put Terro Ant Poison into Stewart Taylor's beverages on February 1, 1979. (T. 576) Ms. Barfield said that prior to January 1, 1978, she had forged some checks on Stewart Taylor's account, that he had discovered the forgeries, and that he had threatened to turn her in if she forged any more checks. (T. 575) After this happened, on January 31, 1978, Ms. Barfield forged another check on Taylor's account. Worried that Taylor would discover her latest forgery, she poisoned Taylor "to make him sick" (T. 638), in order to obscure the forgery.

In order to show Ms. Barfield's intent and knowledge in poisoning Mr. Taylor, and to suggest that the poisoning of Taylor may have been part of a larger scheme, the State also presented evidence connecting Ms. Barfield with the poisoning deaths of four other people over the previous seven years. Despite the extraordinarily prejudicial nature of this evidence, the trial judge admitted the evidence on a narrow basis: in relation to whether Ms. Barfield intended to kill Stewart Taylor, whether she knew that giving him poison would likely kill him, and whether the poisoning of Stewart Taylor was part of a common design or purpose. (T. 407-431, 824-826)

The defense case during the guilt phase of Ms. Barfield's trial rested upon a plea of not guilty by reason of insanity.[3] However, the defense presented absolutely no evidence in support of an insanity defense. To the contrary, all of the expert witnesses presented by Ms. Barfield testified that she was both sane and competent. (T. 601-606; 678-679; 702) Having failed to present any evidence in support of an insanity defense, the defense instead attempted to negate the element of intent by showing that at the time of Taylor's murder and for the preceding ten years, Ms. Barfield had suffered from a severe depression,

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3 Prior to trial, Ms. Barfield had entered pleas of not guilty and not guilty by reason of insanity. (T. 36, 282)

that she had a "passive-dependent" or "passive-aggressive" personality, and that she suffered from the symptoms of severe and chronic drug abuse. (T. 591-606; 673-718) In particular, Ms. Barfield's manner of abusing drugs often kept her strongly sedated, dulled intellectually and on some occasions, in a hypnotic state. (T. 676-678; 690-692) On the day she poisoned Stewart taylor, Ms. Barfield had taken a combination of drugs which produced these effects on her. (T. 745)

Upon close of Ms. Barfield's case in the guilt phase of her trial, the judge instructed the jury, inter alia, that

> [t]he defendant has been accused of first degree murder by means of poisoning. Our legislature has provided in the statutes dealing with murder that a murder which shall be perpetrated by means of poison or by any other kind of willful, deliberate and premeditated killing shall be deemed to be murder in the first degree....
>
> As I have indicated, ordinarily first-degree murder -- an essential element of first degree murder is premeditation and deliberation. Our legislature by declaring that murder by poison constitutes premeditation and deliberation has established and declared that where a murder was committed by means of poison that premedita tion and deliberation are deemed to exist; ....

(T. 817-818) Following an hour of deliberation, the jury found Ms. Barfield guilty of first-degree murder. Thereafter, a separate sentencing proceeding was held, pursuant to N.C. Gen. Stat. §15A-2000, to determine whether she should be sentenced to death or life imprisonment. At the sentencing hearing, the prosecution presented no additional evidence, and Ms. Barfield presented additional lay testimony concerning only the nature and extent of her drug abuse. (T. 838-847)

Upon the close of the sentencing hearing, the jury was instructed to consider three aggravating circumstances,[4] and two specific mitigating circumstances.[5] (T. 885-899) In addition,

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4 The murder was committed for pecuniary gain, N.C. Gen. Stat. §15A-2000(e)(6), and to hinder enforcement of the law, N.C. Gen. Stat. §15A-2000(e)(7), and the murder was especially heinous, atrocious or cruel, N.C. Gen. Stat. §15A-2000(e)(9).

5 The murder was committed while the defendant was under the influence of mental or emotional disturbance, N.C. Gen. Stat. §15A-2000(f)(2), and the capacity of the defendant to appreciate the criminality of her conduct, or to conform her conduct to the requirements of law, was impaired, N.C. Gen. Stat. §15A-2000 (f)(6).

the jury was instructed that they could consider "all evidence ...heard in both phases of the case...in this sentencing proceeding." (T. 882) In its verdict, the jury found, pursuant to questions asked by the instructions, that all three of the aggravating circumstances were present, that the mitigating circumstances did not outweigh the aggravating circumstances, that the aggravating circumstances were sufficiently substantial to call for the death penalty, and that Ms. Barfield should be sentenced to death. (RA. 48-49) Judgment and sentence were imposed accordingly on December 2, 1978 (RA. 51-52).

C. How the Federal Questions Were Raised and Decided Below

(1) The Sandstrom Error

Ms. Barfield first raised this claim in her state post-conviction proceedings. Amended Motion for Appropriate Relief (November 6, 1980), ¶14. The trial court denied relief on the merits as follows:

> The whole of the trial judge's charge, both in the guilt phase and the penalty phase, were in the record on appeal to the Supreme Court. That Court gave those instructions a close scrutiny. If there was legal error within any of the instructions as given, the Supreme Court would have said so. To the contrary, it found no error. It "combed the record." ... The trial judge gave valid lawful and constitutionally proper instructions to the jury in each phase of the trial.

(App. 80a-81a) On appeal, the Supreme Court of North Carolina denied review (App. 84a).[6]

The claim was raised in the same fashion in federal habeas proceedings. Petition for Writ of Habeas Corpus by a Person in State Custody (March 9, 1982), ¶30. The district court denied relief on the merits, holding that the Sandstrom error complained

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[6] In the federal courts, respondents argued that Ms. Barfield's failure to raise this issue on direct appeal barred review of the claim in state post-conviction or federal habeas corpus proceedings. Ms. Barfield responded that the rule of County Court of Ulster County v. Allen, 442 U.S. 140, 147-154 (1979) applied, since the state courts reached the merits of the claim despite procedural default under state law. Because the respondents conceded that the trial court reached the merits of all the post-conviction claims, and Mr. Barfield demonstrated that on appeal to the North Carolina Supreme Court the respondents did not argue procedural default, Ulster County permitted the claims to be entertained even though the state Supreme Court's refusal to review her case indicated no reason why review was denied.

of did not prejudice Ms. Barfield (App. 102a), and the court of appeals adopted the holding of the district court respecting this issue (App. 6a).

(2) The Lockett-Violative Sentencing Trial Instruction

Ms. Barfield raised this claim in state post-conviction proceedings, Amended Motion for Appropriate Relief (November 6, 1980), ¶16(e), where the trial court denied relief on the merits (App. 80a-81a) (quoted supra). On appeal, the Supreme Court of North Carolina denied review (App. 84a). See n.6, supra.

This claim was raised in the same fashion in federal habeas proceedings. Petition for a Writ of Habeas Corpus by a Person in State Custody (March 9, 1982), ¶32(e). The district court denied relief on the merits, holding,

> Mitigating circumstances are given sufficient "independent mitigating weight," Lockett v. Ohio, ... in a balancing with aggravating factors. Moreover, in this case the jury before it reached the "balancing" question had already determined that there were no mitigating circumstances to be weighed, whether by balance or otherwise.

(App. 106a) The court of appeals adopted the holding of the district court respecting this issue (App 6a).

(3) The Witherspoon Juror

Ms. Barfield raised this issue in her direct appeal, Defendant-Appellant's Brief at 17-19, and the Supreme Court of North Carolina held against her on the following basis:

> While it is true that taken by themselves, the answers that some of the jurors called in defendant's trial seem to be equivocal or contradictory, taken as a whole the examination indicates opposition to the death penalty so strong that they could not vote to impose it regardless of the evidence.

(App. 29a)

Ms. Barfield raised the same claim in federal habeas proceedings. Petition for Writ of Habeas Corpus by a Person in State Custody (March 9, 1982), ¶37. The district court held against her:

> Although he certainly equivocated during the voir dire, [juror Dent] stated several times that under no circumstance could he vote to recommend the death sentence. The trial judge was actively involved in the examination and carefully phrased the "hard" question. He apparently believed that Mr. Dent's opinion

> ultimately was unequivocal. This court agrees and therefore holds there was no Witherspoon violation in the exclusion of Mr. Dent.

(App. 100a) The court of appeals adopted the holding of the district court respecting the issue (App. 6a).

(4) Ineffective Assistance of Counsel

Ms. Barfield first raised this claim in her state post-conviction proceedings. Amended Motion for Appropriate Relief (November 6, 1980), ¶10. The trial court held that counsel was effective in both phases of the trial (App. 58a-73, 76a-79a), and the Supreme Court of North Carolina denied review (App. 84a).

The claim was raised in the same fashion in federal habeas proceedings. Petition for a Writ of Habeas Corpus by a Person in State Custody (March 9, 1982), ¶26. On the two aspects of this claim presented herein, the district Court held as follows:

> Although he consulted with a relative who was a psychiatrist and had the benefit of consultation with each of the three psychiatrists who testified at the trial, Mr. Jacobson probably could have increased his knowledge in the field of psychiatry, and certainly had he shopped long enough he could have located an expert who could have testified as to the petitioner's sanity in a manner even more unequivocal than did Dr. Rose at the post-conviction hearing. That he did not do so cannot in view of the record in this case be held to have been constitutionally inadequate.
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> * * * *
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> Ineffectiveness of trial counsel in not calling additional character witnesses has not been established.

(App. 93a) The court of appeals adopted the holding of the district court respecting this issue (App. 6a).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW AND REMEDY THE FUNDAMENTAL INJUSTICE CREATED BY INSTRUCTIONS IN PETITIONER'S TRIAL THAT PERMITTED THE JURY TO CONVICT PETITIONER WITHOUT EVER EXAMINING THE ELEMENT OF HER INTENT TO KILL.

At the close of the guilt-innocence portion of Ms. Barfield's trial, the court instructed the jury that the "legislature ... has established and declared that where a murder was committed by means of poison that premeditation and deliberation are deemed to exist." (T. 818) Despite the clear implication of this and other language in the charge that a murder by poisoning was, as a result, a murder for which the intent to kill was also "deemed to exist," the trial court instructed the jury that the state was nonetheless required to prove beyond a reasonable doubt that Ms. Barfield intended to kill the decedent when she poisoned him. (T. 819) However, this instruction did not counter the apparent direction to the jury that it find the intent element, for even here the court charged that "[a]n intent to kill may be inferred from the act itself, from the nature of the poisoning ...." (Id.) Viewed as a whole, Mrs. Barfield submits that these instructions effectively removed the issue of intent from the jury's consideration. The instructions allowed the jury to convict her "'without ever examining the evidence concerning an element [intent] of the crime[ ] charged.'" Connecticut v. Johnson, ___U.S.___, 103 S.Ct. 969, 982 (1983) (dissenting opinion of Powell, J., quoting plurality opinion). Accordingly, under Sandstrom v. Montana, 442 U.S. 510 (1979), and either of the conflicting views expressed in Connecticut v. Johnson, we submit the instructions in Ms. Barfield's case were constitutionally defective and prejudicial.

Certiorari should be granted with respect to this issue, because the court of appeals and district court's resolution of the important federal questions presented by the issue is "squarely in conflict with applicable decisions of this Court," Rule 17.1(c), Rules of the Supreme Court, namely Sandstrom v. Montana, and Connecticut v. Johnson.

A. The Operation of the Sandstrom Presumption in Ms. Barfield's Case Required the Jury to Find the Intent Element of the Crime Charged.

At the close of the guilt phase of Ms. Barfield's trial, the court instructed the jury with respect to the elements of the charge against Ms. Barfield as follows:

> The defendant has been accused of first degree murder by means of poisoning. Our legislature has provided in the statutes dealing with murder that a murder which shall be perpetrated by means of poison or by any other kind of willful, deliberate and premeditated killing shall be deemed to be murder in the first degree and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine in the appropriate proceeding.
>
> As I have indicated, ordinarily first degree murder -- an essential element of first degree murder is premeditation and deliberation. Our legislature by declaring that murder by poison constitutes premeditation and deliberation has established and declared that where a murder was committed by means of poison that premeditation and deliberation are deemed to exist; so I instruct you that for you to find this defendant guilty of murder by means of poison the State must prove four things beyond a reasonable doubt.
>
> First, that the defendant caused poison to be placed in the, or to enter the body of Stewart Taylor. A poison is a substance which is likely to cause death by a chemical reaction when placed in it or caused to enter the body of a human being.
>
> Second, that the defendant did this with malice. Malice means not only hatred, ill will or spite but it also means that condition of the mind which prompts a person to take the life of another intentionally or to intentionally inflict serious injury upon another person which proximately results in the death without any just cause, excuse or justification. Malice would also include wantonly acting in such a manner as to indicate a depraved mind or a heart devoid of a sense of social duty and a callous disregard to human life. The intentional giving to a person of a poison known by the person administering it to be capable of causing death would be an act done with malice.
>
> Third, the State must prove that the poisoning was the proximate cause of Stewart Taylor's death. A proximate cause of death is a real cause, a direct cause without which the death would not have occurred.
>
> And four, the State must prove beyond a reasonable doubt that the defendant intended, by administering poison, to kill Stewart Taylor, that is, to take his life. Intent is a mental attitude which is seldom provable by direct evidence. The intent of a person charged with a crime must be inferred in -- in many cases. An intent to kill may be inferred from the act itself, from the nature of the poisoning, from the conduct of the defendant,

> from any statements made by her and any other relevant circumstances that shows that an intent to kill actually existed in the mind of the defendant at the time of administering any poison;....

(T. 817-819) (emphasis supplied).

Ms. Barfield submits that these instructions could have been interpreted by a reasonable juror, Sandstrom v. Montana, 442 U.S. at 514, as requiring the finding of the fourth element -- that she intended to kill the decedent -- upon the mere finding of the first and third elements -- that she "caused poison ... to enter the body of Stewart Taylor" which was "the proximate cause of Stewart Taylor's death." A reasonable juror could have interpreted the instructions in this manner because he or she was charged that when a murder in North Carolina is committed by poisoning, a "kind of willful, deliberate and premeditated killing," the "legislature ... has established and declared ... that premeditation and deliberation are deemed to exist."

This charge could reasonably have been interpreted to require a finding of intent to kill solely upon a finding that Ms. Barfield killed the decedent by poisoning in the following way. Having characterized a murder by poisoning as a murder in which "premeditation" and "deliberation" are legislatively "deemed to exist," the charge required the jury to treat such a murder irrebuttably as premeditated and deliberate. Upon the finding that Ms. Barfield killed the decedent by poisoning him, therefore, the jury had to presume conclusively that the killing was carried out with "premeditation" and "deliberation." In this way, a conclusive presumption about the mental state with which the crime was carried out was interjected even though premeditation and deliberation were thereafter excluded as "elements" of the offense. Because the mental states of "premeditation" and "deliberation" are, however, commonly understood when applied to murder as referring to a murder carried out with the intent to kill,[7] the interjection of the conclusive presumption of premeditation and deliberation could nonetheless have dictated the

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[7] See Webster's New Collegiate Dictionary 297 ("deliberate" means "characterized by awareness of the consequences: willful"), 901 ("premeditated" means "characterized by fully conscious willful intent and a measure of forethought and planning").

finding of what clearly was an element -- the intent to kill. A reasonable juror could accordingly have interpreted the conclusive presumption that a poisoning murder is premeditated and deliberate as compelling a finding of intent to kill.

That a reasonable juror could have interpreted the instructions as mandating the finding of intent is further confirmed by the meaning of these instructions under North Carolina law. Consistent with the common understanding, the Supreme Court of North Carolina has consistently held that "a specific intent to kill is a necessary ingredient of premeditation and deliberation." State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526, 532 (1970). As further explained in State v. Jones, 303 N.C. 500, 279 S.E.2d 835, 838-39 (1981),

> [p]remeditation is defined as thought beforehand for some length of time; deliberation means an intention to kill, executed by defendant in a 'cool state of blood' in furtherance of a fixed design or to accomplish some unlawful purpose. [Citations omitted] Specific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation. [Citation omitted] Thus, proof of premeditation and deliberation is also proof of intent to kill.

See also State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595, 599 (1976); State v. Cooper, 286 N.C. 549, 213 S.E.2d 305, 320 (1975). As a matter of well-settled state law, therefore, the instructions in Ms. Barfield's case literally required the jury to find that Ms. Barfield intended to kill the decedent. Premeditation and deliberation were conclusively established by the very nature of the murder, and because the jury was instructed that this was so, the intent to kill could also have been interpreted as conclusively established. Accordingly, there can be no genuine dispute that these instructions could reasonably have operated "as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption," Sandstrom, 442 U.S. at 517, which in Ms. Barfield's case, were merely that she killed Stewart Taylor by poisoning.[8]

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[8] By focusing upon the formal elements of murder by poisoning in North Carolina, rather than upon the reasonable interpretation of the instruction in Ms. Barfield's case, the district court, and by its summary adoption of the district court's resolution of the Sandstrom issue, the court of appeals, failed to analyze the constitutional error complained of by Ms. Barfield. Relying on

Moreover, nothing in the charge to the jury viewed in its entirety, see Cupp v. Naughten, 414 U.S. 141, 147 (1973), would have dispelled this interpretation of the instructions. The trial court did instruct the jury that the state had the burden of proving all elements of the offense, including the element of intent to kill, beyond a reasonable doubt. After instructing the jury that "the State must prove beyond a reasonable doubt that the defendant intended, by administering poison, to kill Stewart Taylor," however, the trial judge instructed the jury that intent to kill must often be demonstrated by circumstantial evidence.

> Intent is a mental attitude which is seldom provable by direct evidence. The intent of a person charged with a crime must be inferred in -- in many cases. An intent to kill may be inferred from the act itself, from the nature of the poisoning, from the conduct of the defendant, from any statements made by her....

If a juror hearing this instruction already believed, on the basis of the instructions complained of by Ms. Barfield, that he or she was required to find that the murder was committed with intent to kill, nothing in this instruction would have dispelled that belief. That "[a]n intent to kill may be inferred from the act itself, from the nature of the poisoning" (emphasis supplied), would only have corroborated the notion that the poisoning itself conclusively established the intent to kill. As in Sandstrom, therefore,

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North Carolina authority to the effect that premeditation and deliberation are not elements of first degree murder when the murder is committed by poisoning, the district court held that the conclusive presumption of premeditation and deliberation was immaterial (App. 102a). Since premeditation and deliberation, accordingly, "need not be proved to make out a crime, presuming that fact does not violate Sandstrom, ..." (Id.) The district court then went on to hold in the alternative, that the conclusive presumptions were harmless in any event, because "premeditation was simply not in issue in this case." (Id.) Despite noting thereafter that the "only element in issue was whether she [poisoned the decedent] with the intent to kill" (id.), the court never analyzed at all the presumption complained of by Ms. Barfield: the presumption of intent to kill that was necessarily operative by virtue of the instructed presumptions of premeditation and deliberation. That premeditation and deliberation may not have been formal elements of the crime charged, and that neither of these elements was "in issue," does not matter. What matters is that the intent to kill --which was "in issue" -- could have been found simply because a reasonable juror may have interpreted the conclusive presumption of premeditation and deliberation contained in the charge as a mandatory direction to find intent to kill.

> [t]he jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond reasonable doubt as to intent could be satisfied.

442 U.S. at 518-519 n.7.

Accordingly, the instructions taken as a whole could not have cured the constitutional infirmity of that portion of the instructions requiring the finding of intent solely upon the state's satisfying its burden to prove that Ms. Barfield killed the decedent by poisoning. Sandstrom error was, in short, manifest in Ms. Barfield's trial. And, as the remaining discussion of this issue demonstrates, that error was not harmless.

B. The Competing Analyses of Harmless Error Under Sandstrom Have Nevertheless Produced a Rule of Harmless Error Which Can Be Applied in an Appropriate Case.

In the only attempt thus far to settle the question of prejudice under Sandstrom -- which Sandstrom itself expressly left open, 442 U.S. at 526-27 -- the Court has divided evenly on the merits of the issue. Connecticut v. Johnson, supra. Despite the sharply conflicting analyses of prejudice in Johnson however, Johnson did establish a rule of prejudice which is applicable in some cases -- in which Sandstrom error cannot be deemed harmless under either of Johnson's conflicting views. Ms. Barfield submits that hers is such a case. Before that can be shown, however, Johnson's two rules of harmless error must be examined.[9]

Writing for a plurality of four justices, Justice Blackmun would have held, at least as to cases in which criminal intent was a contested element, that Sandstrom error cannot be harmless, because "a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue," 103 S.Ct. at 976, and "'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict ... regardless of how overwhelmingly the evidence may point in that direction.'" Id. (quoting United States v.

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9 While the Court's grant of certiorari this term in Koehler v. Engle, ___U.S.___, 104 S.Ct. 231 (1983) (No. 83-1) may give the Court another opportunity to address the prejudice issue, Johnson is the only case which has thus far attempted to address it. As petitioner argues herein, because the issue of prejudice in her case can be resolved under the "rule" of Johnson, Koehler should not affect the decision of her case, unless of course, the Court finds that Johnson does not resolve this issue in her case.

Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977)). In the plurality's view, the conclusive presumption was the functional equivalent of the directed verdict, "because the jury may have relied upon the presumption rather upon [the] evidence [concerning the disputed element]," id. at 977, and as a result, may have "convict[ed] respondent without ever examining the evidence concerning an element of the crimes charged," id. at 978.

Writing for himself and three other justices in dissent, Justice Powell rejected the view that the conclusive presumption is the functional equivalent of a directed verdict. While agreeing with the plurality that the effect of a directed verdict is to "permit[] a jury to convict a defendant 'without ever examining the evidence concerning an element of the crimes charged,'" id. at 978, Justice Powell found that the plurality's analysis

> misperceives the way a presumption instruction, conclusive or otherwise, functions. A presumption informs the jury that once a party has proved A, the basic fact, the jury can or must presume B, the presumed fact. Contrary to the plurality's assumption, a Sandstrom-type presumption does not operate independently of the evidence. The jury must look to the evidence initially to see if the basic facts have been proved before it can consider whether it is appropriate to apply the presumption.

Id. at 982. And, "[i]f ... these basic factors are themselves dispositive of intent, the presumption becomes unnecessary to the jury's task of finding intent." Id. at 983. Precisely because, in Justice Powell's view, the basic facts may be so dispositive of intent that the presumption is unnecessary to the finding of intent, Justice Powell would have held that there can be harmless error associated with Sandstrom error, even in a case in which intent is in dispute, where "the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." Id. at 983 n.5.

Despite the sharp divergence of views expressed by the plurality and the dissent in Johnson, we submit that there is fundamental -- albeit not express -- agreement on the touchstone of constitutional harm visited by a Sandstrom presumption: a defendant is harmed if the jury relies on the presumption instead

of or in addition to the evidence, to find an element of the crime. See id. at 977 ("the jury may have relied upon the presumption rather than upon [the] evidence") (plurality opinion); id. at 983 n.5 (the error is harmless only if "beyond a reasonable doubt ... the jury would have found it unnecessary to rely on the presumption") (dissenting opinion) (emphasis supplied). The real difference, therefore, between the plurality and the dissent in Johnson is the test by which the courts must determine whether there has been reliance on a Sandstrom presumption. The plurality would hold that there has been reliance on a presumption of intent if the presumption "may" have been relied on, instead of or in addition to the evidence, to find intent. Id. at 977 & n.15. The dissent on the other hand, would hold that there has been reliance only if the presumption "must" have been relied on in addition to the "basic facts" for the jury to find intent. Id. at 983 & n.5.

While Sandstrom error in some cases may be deemed prejudicial under the Johnson plurality's test but harmless under the Johnson dissent's test, in some cases the error will be deemed prejudicial under both tests. In such cases, Johnson requires that the conviction be set aside and a new trial allowed. Ms. Barfield submits that hers is such a case.

C. Pursuant to Connecticut v. Johnson, the Sandstrom Error in Ms. Barfield's Case Cannot Be Deemed Harmless.

Both the Johnson plurality's analysis of prejudice and the Johnson dissent's analysis of prejudice compel the finding that the Sandstrom error here was not harmless.

Ms. Barfield's only defense was that she did not intend to kill the decedent by poisoning him. She contended that she had no actual intent to kill (T. 827). Moreover, she contended that she was incapable of forming the requisite intent to kill because of the combined effects of drug ingestion and mental disorder at the time she poisoned the decedent (T. 827-829). Because the facts about her intent were in dispute, the jury may have relied upon the presumption to resolve this dispute. Thus, pursuant to the plurality's analysis, the presumption cannot be deemed harmless. Johnson, 103 S.Ct. at 977-78.

That the facts about Ms. Barfield's intent were in dispute is not necessarily enough to establish prejudice under the dissent's analysis however. Rather, that analysis requires that the "basic facts" --the facts which trigger the presumption and which therefore must be proved before the presumption can be applied -- be examined to determine whether "these ... facts are themselves dispositive of intent," for if they are, the presumption is harmless. Id. at 982-83.[10] Here the "basic facts" are that Ms. Barfield poisoned the decedent and that the decedent died as a result of the poisoning. See T. 817-819, and the discussion herein, at pages 10-14, supra. These basic facts must be examined under the dissent's analysis to determine "whether [they were] so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." Johnson, 103 S.Ct. at 983 n.5. These basic facts cannot be said to have been so dispositive of intent to meet this test, however. While the act of killing a person by poisoning certainly suggests that the killer acted with the intent to kill, that act alone cannot be deemed dispositive of intent beyond a reasonable doubt. Because other reasonably inferrable "intents" can be drawn from this act alone, such as an intent to debilitate but not kill or a non-intent like mistake or accident, reasonable doubt exists. Cf., Johnson, 103 S. Ct. at 984 (the commission of a homicide by an "execution-style slaying," in contrast, is so dispositive of intent as to meet the dissent's test). Accordingly, the Sandstrom error here cannot be deemed harmless under either the plurality's or the dissent's harmless error rule announced in Johnson.[11]

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[10] Under such circumstances, and only under such circumstances, would the presumption be "unnecessary to the jury's task of finding intent."

[11] It may be argued that, in applying the dissent's test, the evidence related solely to intent, such as Ms. Barfield's commission of other poisoning homicides, must be taken into account in the application of the test. This cannot be done, however, for such facts are not part of the "basic facts" which must be "proved before [the jury] can consider whether it is appropriate to apply the presumption." Id. at 982. Only the "basic facts" can be examined in applying the dissent's test, for it is only those facts which the jury must consider before utilizing the presumption. Id. If those basic facts are not sufficient to prove intent, under the dissent's test the pre-

For these reasons certiorari must be granted, and Ms. Barfield's conviction must be vacated because it was obtained in violation of Sandstrom and Johnson.

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER'S PENALTY TRIAL INSTRUCTIONS CREATED THE RISK THAT THE DEATH PENALTY WAS IMPOSED IN SPITE OF FACTORS WHICH MAY HAVE CALLED FOR A LESS SEVERE PENALTY, BECAUSE THE INSTRUCTIONS MAY HAVE PERMITTED THE JURY NOT TO CONSIDER MITIGATING CIRCUMSTANCES IN MAKING THE DETERMINATION THAT DEATH WAS THE APPROPRIATE PUNISHMENT FOR PETITIONER.

In considering whether to sentence Ms. Barfield to death or to life imprisonment, the jury in her penalty trial was instructed to answer four questions:

> [1] Do you find beyond a reasonable doubt that the following aggravating circumstance or circumstances exist?
>
> [2] Do you find that one or more of the following mitigating circumstances exist?
>
> [3] Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances is or are sufficient to outweigh the aggravating circumstance or circumstances?
>
> [4] Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances is or are sufficiently substantial to call for the death penalty?

(T. 885-886)

Under North Carolina law, the fourth question asked of Ms. Barfield's jury is the "ultimate" question in which jurors must "deci[de] between life and death" for the defendant before them. State v. McDougall, ___N.C.___, 301 S.E.2d 308, 324, 326 (1983). If, in making the decision required by this question, the jurors may have understood that they were to examine only whether the aggravating circumstances alone were so substantial as to warrant

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sumption cannot be deemed harmless, id. at 982-83, for there can then be no certainty that the jury would not utilize the presumption to resolve the disputed facts about intent instead of resolving those facts on their own merits. Compare id. at 977 n.15 (in which the plurality misunderstands this basic requirement when it questions the dissent's belief "that a jury first evaluates the evidence of intent and then decides whether to apply the conclusive presumption"; as the dissent makes clear, its rule is based upon the belief that the jury first evaluates only the evidence which must be proved to trigger the presumption of intent, and that evidence is not "the evidence of intent"). Thus only the "basic facts" -- here, that Ms. Barfield killed the decedent with poison -- can be taken into account in applying the dissent's test.

the death penalty -- rather than that they were to reconsider and reweigh the totality of mitigating circumstances, as well as aggravating circumstances, and in light of this process, determine whether the aggravating circumstances were nonetheless sufficiently substantial to call for death -- the risk was created that "the death penalty [would] be imposed in spite of factors which may [have] call[ed] for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978). Accordingly, if the answer to this question is that "'death is the appropriate punishment in a specific case,'" id. at 601 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)) (emphasis supplied), that answer is sufficiently reliable under the eighth amendment only if the sentencer is clearly required to give "independent ... weight" to the mitigating circumstances proffered on behalf of the defendant in making "the choice ... between life and death." Lockett, 438 U.S. at 605.

We submit that the trial court's instructions with respect to the fourth question did not sufficiently inform Ms. Barfield's jury that it was required to do this in answering the question. An examination of the instructions reveals, to the contrary, that the jury was essentially directed to consider only the aggravating circumstances in answering this question.

> If you have answered some portion of the first issue yes, and have answered the third issue yes, you will go on and consider the fourth issue and that is, "Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances is or are sufficiently substantial to call for the death penalty?" The burden of proof on that is on the State to satisfy you beyond a reasonable doubt that the aggravating circumstances sufficient -- found them to exist [sic]. If you do find that the aggravating circumstances are sufficiently substantial, then the death penalty would be recommended. If you do not so find, your recommendation would be life imprisonment.
>
> The State contends upon that issue that you should find that the aggravating circumstances themselves are sufficiently substantial to call for the death penalty and that you should find they outweigh any mitigating circumstances if you find them to exist; and that the death penalty should be imposed.
>
> The defendant contends that you should not find the aggravating circumstances existing to be sufficiently substantial to call for the death penalty and that upon the whole case balancing are mitigating or aggravating circumstances, that the aggravating circumstances are not such

> as should call for the death penalty in this case; and the defendant contends that you answer this issue no.
>
> I instruct you, members of the jury, that if considering those aggravating circumstances that you find to exist, you find that they are in themselves sufficiently substantial to call for the death penalty and that they outweigh any mitigating circumstances sufficient to call for the death penalty, you would answer this fourth issue yes. If you fail to so find, you would answer it no.
>
> To review, members of the jury, if you have answered some portion of the first issue yes, that is, found at least one aggravating circumstance, and if you have answered the third issue yes, that is, the mitigating circumstances are insufficient to outweigh the aggravating circumstances; have answered the fourth issue yes, finding that the aggravating circumstances are sufficiently substantial to call for the death penalty, then upon those findings, it would be your duty to recommend to the court that the punishment for the defendant, Margie Bullard Barfield, be death. If you fail to so find, that is, either fail to find the existence of an aggravating circumstance or if you fail to find that the aggravating circumstances outweigh the mitigating circumstances, or if you fail to find that the aggravating circumstances in themselves are sufficiently substantial to call for the death penalty, then your recommendation would be life imprisonment.

(T. 898-99)

In context, these instructions repeatedly directed the jury to consider only whether the aggravating circumstances were "in themselves sufficiently substantial to call for the death penalty" (emphasis supplied). While the instructions at several points suggested that there were two inquiries to make before the fourth question could be answered --

> if considering those aggravating circumstances that you find to exist, you find that they are in themselves sufficiently substantial to call for the death penalty and that they outweigh and mitigating circumstances sufficient to call for the death penalty, you would answer this fourth issues yes

(emphasis supplied) -- the instructions did not make clear that the second inquiry was any different from the inquiry already made in answering the third question.[12]

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12 "Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances is or are insufficient to outweigh the aggravating circumstances?" (T. 886).

In short, the very same observations and constitutional concerns are evinced by the questions to the jury in Ms. Barfield's case that were evinced in Smith v. North Carolina, ___U.S.___, 103 S.Ct. 474 (1983) (opinion of Stevens, J., respecting the denial of certiorari).

> On the one hand, the instructions may be read as merely requiring that the death penalty be imposed whenever the aggravating circumstances, discounted by whatever mitigating factors exist, are sufficiently serious to warrant the extreme penalty. Literally read, however, those instructions may lead the jury to believe that it is required to make two entirely separate inquiries: First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "death is the appropriate punishment in a specific case." [Citations omitted.]

Id. at 474-75.

Justice Stevens "[did] not criticize the Court's action in denying certiorari" in Smith, "because the question whether the instructions to the juries are consistent with Lockett remain[ed] open [there] for consideration in collateral proceedings," id. at 475. The same cannot be said, however, if the Court declines to review this question in Ms. Barfield's case. Ms. Barfield can present this issue to no other court before she is executed. Accordingly, now is the time to review this issue, and this is the case.

The need for review is not only critical for Velma Barfield, but is also critical for the many other people sentenced to death in North Carolina prior to April 5, 1983. On that date, the Supreme Court of North Carolina responded to Justice Stevens' concerns in Smith by developing wholly new principles governing the jury's consideration of the fourth question. Emphasizing the need for the jury to give independent weight to mitigating circumstances, the court noted that

> [t]he fourth issue is not an isolated, independent question that may be answered without reference to the other issues and circumstances

> of the case. This is manifested by the language of the General Assembly --"[b]ased on these considerations" should the defendant be sentenced to death or life imprisonment. N.C. Gen. Stat. § 15A-2000(b)(3) (Cum. Supp. 1981). In deciding the fourth issue, the jury must consider the aggravating circumstances found, the mitigating circumstances found, and the degree to which the aggravating circumstances outweigh the mitigating circumstances. The jury must compare the totality of the aggravating circumstances with the totality of the mitigating circumstances and be satisfied beyond a reasonable doubt that the statutory aggravating circumstances found are sufficiently substantial to call for the imposition of the death penalty and that the death penalty is justified and appropriate.

State v. McDougall, 302 S.E.2d at 326. To implement these principles, the court also set forth what it deemed to be "[a]ppropriate instructions on the fourth issue," id. at 327, which spoke even more strongly to the need for independent weight to be given mitigating circumstances in the jury's process of deciding between life and death.

> "In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue 'yes.' In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. The jury may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstance are when compared with the totality of the mitigating circumstances found by you. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, it would be your duty to answer the issue 'yes.' If you are not satisfied or have a reasonable doubt, it would your duty to answer the issue 'no.'"

Id. at 327-328 (footnotes omitted).

This instruction substantially removes the risk that sentencing decisions in North Carolina will be made without the constitutionally necessary consideration being given to mitiga-

ting circumstances. The instructions in Ms. Barfield's case, on the other hand, as well as in many other North Carolina capital defendants' cases tried prior to April 5, 1983, created just that risk. Even though the instructions in Ms. Barfield's case "may be read as merely requiring that the death penalty be imposed wherever the aggravating circumstances discounted by whatever mitigating factors exist, are sufficiently serious to warrant the extreme penalty," Smith, 103 S.Ct. at 474, the instructions may also be read as not requiring the critical "discounting" process which is necessary for the jury to give independent weight to mitigating circumstances. Id. That the instructions may be read either way is itself a sufficient basis for relief, Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring),[13] and accordingly, should be at least a sufficient basis for a grant of certiorari. Since it is so clearly possible to instruct juries in such a way that the risk identified by Justice Stevens in Smith is minimized, the Court should, at the very least, review the constitutional consequences of that risk in cases where it was present.

In concluding the discussion of this question, there is one other concern which must be addressed, for it bears upon whether Ms. Barfield's cases is the appropriate case for considering the question presented. The courts below decided this issue against Ms. Barfield in part because they concluded that the jury had found no mitigating circumstances. See App. 2a, 106a. If this conclusion were correct, Ms. Barfield's case might not be deemed appropriate for review of the issue, because she may not have been prejudiced by the defect in the instructions. However, while the trial record is ambiguous as to the jury's findings regarding mitigation, the lower courts' conclusion that the jury found no mitigating circumstances is patently incorrect. All that can be firmly stated with regard to this matter is that we cannot determine with certainty whether the jury found any mitigating circumstances. There were mitigating facts in

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13 "Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." Id.

evidence, however, which the jury did not find not to be mitigating. Accordingly, we must assume that the jury did find some mitigating circumstances.

The record is as follows. The sentencing verdict form provided to the jury in Ms. Barfield's case included the following question related to the existence of mitigating circumstances:

> 2. Do you find that one or more of the following mitigating circumstances exist?
>
> a. The murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> b. The capacity of the defendant to appreciate the criminality of the conduct or to conform her conduct to the requirement of the law was impaired.
>
> c. Other circumstances which the jury deems to have mitigating value:

(RA. 49) With respect to answering this question, the jury was first instructed as to how to record its answer to each sub-part of the question (T. 895-96). The jury was then instructed that "if you fail to find mitigating circumstances, you should answer all three sections of Question Two no" (T. 896). When the jury returned its verdict, it answered sub-parts (a) and (b) of Question Two, "No" (RA. 49). However, it gave no answer at all to sub-part (c). (Id.)

While the record is thus ambiguous as to whether the jury found no mitigating circumstances or some unspecified circumstances "deem[ed] to have mitigating value," we submit that the ambiguity should be resolved in favor of the jury's having found the latter. There are two reasons to support this conclusion. First, there was uncontradicted evidence in the record which was at least substantial enough to be considered as "[o]ther circumstances which the jury deems to have mitigating value," despite the jury's explicit rejection of this evidence as establishing the statutory mitigating circumstances of emotional disturbance and impaired capacity [sub-parts (a) and (b) of the mitigating circumstance question, supra]. As summarized by the judge in the sentencing trial charge,

> The Defendant has offered evidence in the trial phase of this case and certain additional evidence in this penalty phase tending to show

> years habitually taking a series and a variety of medications, some of which were narcotics, many of which had effects on the mind, some of which were anti-depressants. One doctor referred to them as uppers, some of which were tranquilizers, some sleeping pills and some medicine for pain. She contended that by reason of the taking of such medications that she was under continuous mental or emotional disturbance and that she was at the time of the administering of the poison to Stewart Taylor. She contends that by reason of the taking of medications over this period of time and of defects in her personality or mental makeup, that her ability to understand rightness and wrongness of an act or to live by the law and not violate the law was impaired or reduced so as to keep her from thinking rationally and clearly; and she contends that her abuse of drugs over a period of time was sufficient as to be in itself a mitigating circumstance which should lessen any punishment or penalty that might be provided in this case.

(T. 893-94) (emphasis supplied). Second, and in light of the uncontradicted evidence proffered in mitigation, because the jury was expressly instructed that upon failing to find mitigating circumstances, it should answer "no" to all of the sub-parts of Question Two, including sub-part (c), its failure to answer sub-part (c) "no" must be taken to mean that the jury found non-statutory mitigating circumstances --which may not even have been articulable but which were nevertheless mitigating.[14] Thus, the record ambiguity should be resolved in favor of the jury's having found some unspecified mitigating circumstance or circumstances.

For the reasons we have outlined, therefore, now is the appropriate time, and Ms. Barfield's case is the appropriate vehicle, for undertaking a review of this issue.

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[14] In a dissenting opinion in State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), Justice Exum concluded that the same issue presented here by Ms. Barfield and later discussed in Smith established a violation of the eighth amendment in part because mitigating circumstances are not always articulable.

> Conscientious juries may determine that these issues [whether aggravating circumstances exist, which outweigh mitigating circumstances, and are sufficiently substantial to call for the death penalty] ought to be answered affirmatively and yet, because of circumstances of the case, "nuances," if you will, not subject to articulation in a statute or a verdict and not perhaps articulable by the jurors themselves, feel impelled to recommend that the death penalty not be imposed.

Id. 234.

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICTING ANALYSES OF WITHERSPOON'S "UNMISTAKABLY CLEAR" REQUIREMENT AS APPLIED TO THE "I DON'T BELIEVE I COULD" JUROR.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court held that only those prospective jurors who make it "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt," id. at 522-23 n.21 (emphasis in original), can be constitutionally excluded for cause. In the years following Witherspoon, the most difficult application of these principles has been in relation to the "I don't believe I could" juror. Typically, such a prospective juror is opposed to the death penalty, and when asked whether he or she could, under any circumstances, even in the most aggravated case, vote for a sentence of death, the juror responds, "I don't believe I could" or "I don't think I could." Whether such a juror makes it "unmistakably clear" that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before [him]," id. at 522 n.21, has been a subject of great difficulty for the courts of appeals, district courts, and state courts. The question presented here by Ms. Barfield requires the Court's guidance in establishing the proper inquiry when the lower courts are faced with such a juror.

The analysis developed by the fifth and eleventh circuits with respect to such a juror can be contrasted with the "analysis," or lack of analysis, adopted by the fourth circuit with respect to such a juror in Ms. Barfield's case. Because in contrast the analysis by the fifth and eleventh circuits comes much closer to adherence to Witherspoon's strict principles than does the fourth circuit's analysis, the Court should grant certiorari to resolve the conflicting modes of analysis and to establish the need for principled analysis of the voir dires of such jurors with at least the rigor employed by the fifth and eleventh circuits.

The test developed by the Fifth and the Eleventh Circuits for analyzing the excludability of such jurors under Witherspoon is straightforward. For such a juror to be excludable, these courts require that there be some unambiguous factual indicia of an "unmistakably clear" position that qualifies the juror for exclusion under Witherspoon, in addition to the facially ambiguous "I don't believe (think) I can" response. Where the "I don't believe (think) I can" response is the most unambiguous, unequivocal expression given by the juror, it is not sufficient to permit an exclusion under Witherspoon. For example, in McCorquodale v. Balkcom, 721 F.2d 1493, 1501 (11th Cir. 1983) (en banc), the court explained why the "I don't think I could" juror there was properly excluded, in contrast to cases where such jurors were not properly excluded, as follows:

> Woodlief's voir dire, therefore, does not fall within the ambit of those case holding a juror's response inadequate under Witherspoon. In those cases, the juror's response was insufficient either in the light of the ambiguity of the questions asked or because the reply itself indicated confusion or ambiguity that was not clarified by the voir dire. In contrast, Woodlief was responding to properly stated Witherspoon questions and undertook an explanation that allows us to interpret the meaning of her answer without having to engage in speculation as to what her replies would have been if further questions had been propounded.

(Emphasis supplied.) And in O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), because the prospective juror made

> [an] unequivocal statement that he would automatically vote against the death penalty, ... his earlier statement that he could assess the death penalty in an extreme set of circumstances, his prolonged uncertainty and his caveats and qualifications preceding that unequivocal statement do not undercut their validity of [the juror's] exclusion.

Id. at 381-82 (opinion of Randall, J.). Finally, in Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983), the court expressed these principles of analysis in their most explicit terms:

> Prospective juror Colby's responses are limited to expressions of her feelings and her thoughts on the subject of inflicting the death penalty. At no point did she unequivocally state that she would automatically be unable to apply the death penalty or to find petitioner guilty if the facts so indicated.

Id. at 1082.

On the surface, the fourth circuit appeared to apply similar principles of analysis here, through its adoption of the district court's analysis of juror Dent's[15] voir dire:

> Although he certainly equivocated during the voir dire, he stated several times that under no circumstances could he vote to recommend the death sentence.

(App. 100a). If this analysis of juror Dent's voir dire were accurate, Ms. Barfield would not complain. But the analysis is grossly inaccurate. As an analysis of Mr. Dent's voir dire reveals, Mr. Dent never made an unambiguous statement "that under no circumstances could he vote to recommend the death sentence." His statements to this effect were consistently expressed in the equivocal "I don't believe I could" fashion. The fourth circuit's analysis, therefore, amounts to a holding that even though a prospective juror's most unequivocal assertion of his inability to consider the imposition of a death sentence is, "I don't believe I could," that juror has met the "unmistakably clear" requirement of Witherspoon which permits his or her exclusion.

An examination of juror Dent's voir dire strikingly establishes this conclusion. The voir dire examination of Mr. Dent spans seven pages of the record on appeal and is set forth in full at App. 112a-118a. However, the critical portion of the voir dire is in the last two pages, for just prior to this portion of the examination, the trial judge denied the state's challenge of Mr. Dent for cause. (App. 117a)[16] It is this

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[15] Juror Dent is the prospective juror with whom this issue is concerned.

[16] In the portion of the examination preceding the denial of the challenge for cause, Mr. Dent was indisputably equivocal concerning the effect of his opposition to the death penalty on his ability to consider imposing it in an appropriate case. While Mr. Dent at first consistently stated that he did not "believe in" capital punishment (App. 113a), he also conceded that he might believe in its imposition in some cases. Mr. Dent then stated that he did not "believe [he] could" vote to impose the death penalty under any circumstances (App. 113a), then equivocated about this assertion (App. 113a-114a), and then became unequivocal, agreeing with the prosecutor that "under no circumstances could [he] sit on a case in which the death penalty would imposed." (App. 114a) Upon questioning thereafter by the trial judge, Mr. Dent again backed away from this assertion, saying that he "[didn't] know" whether there were any circumstances under which he would vote to impose a death sentence. (App. 115a-116a) In response to subsequent questioning by the defense attorney, Mr. Dent stated unequivocally that he could vote for a death sentence in the worst case he had ever heard about. (App.

portion of the examination of Mr. [redacted] must be scrutinized, for at the end of this segment, the tri[redacted] reversed himself and excused Mr. Dent for cause.

Taken line-by-line, the questions and Mr. Dent's answers in this segment of the voir dire fall chronologically, and by subject matter, into three groups. The first group of questions and answers simply re-confirmed the basis upon which the trial judge had just properly refused to excuse Mr. Dent: that he was willing to consider the imposition of the death penalty in an appropriate case. The second group of questions and answers did nothing at all to undermine this assertion. This group, at App. 117a-118a, simply re-established Mr. Dent's position that he did not "believe in capital punishment." None of these questions or answers suggested, however, that Mr. Dent's beliefs would prevent him from considering the imposition of the death penalty, as he had just said he would, in an appropriate case. See Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262, 264-265 (1970); Ladetto v. Commonwealth, 356 Mass. 541, 254 N.E.2d 415, 416 (1969), reversed, 403 U.S. 947 (1971) (without opinion); Turner v. Texas, 462 S.W.2d 9, 12 (Tex. Cr. App. 1969), reversed, 403 U.S. 949 (1971) (without opinion).

Nor did the final group of questions and answers do anything to undermine Mr. Dent's previous assertion that he would consider the death penalty in an appropriate case, so as to sanction his exclusion. See App. 118a. While Mr. Dent indicated in this segment of his voir dire that he did not "believe" he could consider imposing the death penalty, he did not make it "unmistakably clear" that this was his position. Mr. Dent's most unequivocal answer was, "I don't believe I could" vote to impose the death penalty under any circumstances. There were no other answers by Mr. Dent to indicate that his use of the word "believe" was anything but a sign of equivocation.

Accordingly, Ms. Barfield's case presents a critical question for resolution under Witherspoon: whether the states may be permitted to exclude a prospective juror under the

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116a-117a) After this response, the challenge for cause was denied. (App. 117a)

assertion of his or his inability to consider the imposition of a death sentence is, "I don't believe I could." Because the fourth circuit's determination in Ms. Barfield's case that such a prospective juror is excludable is in conflict with the fifth and eleventh circuits' determination of the same issue -- and, we would submit, is in conflict with Witherspoon and its progeny -- certiorari should be granted.

IV. THE COURT SHOULD GRANT CERTIORARI AND DECIDE PETITIONER'S CASE ALONG WITH STRICKLAND V. WASHINGTON SINCE PETITIONER HAS RAISED SUBSTANTIALLY THE SAME CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL THAT IS PRESENTED IN STRICKLAND.

In Strickland v. Washington ___U.S.___, 103 S.Ct. 2451 (1983), the Court has before it a claim by a capital defendant that he was provided ineffective assistance of counsel in his capital sentencing trial. Specifically, Washington contends that his lawyer failed to conduct adequate investigation of his only defense against death: that he was a person of long-standing good character who committed the crimes he committed only because of the severe emotional distress from which he suffered at the time of the crimes. Washington v. Strickland, 643 F.2d 1243, 1247-49 (5th Cir. 1982) (Unit B) (en banc). Because of counsel's failure to investigate this defense, however, Washington contends that counsel was unable to present the defense effectively -- presenting only a weak argument about Washington's emotional distress (through Washington himself) at the time Washington pled guilty. Id.

Velma Barfield presents virtually the identical claim of ineffective assistance of counsel. In the courts below, like Washington Ms. Barfield argued that she was denied the effective assistance of counsel -- due to inadequate investigation -- in two areas of defense: the impairment of her mental and emotional faculties at the time of the crime, and good character. As the following discussion demonstrates, the contours of Ms. Barfield's claim are remarkably similar to Washington's.

Robert Jacobson, believed that Ms. Barfield's only plausible line of defense in both phases of her trial was a "psychiatric defense." (MT. 65-67, 223) The district court found that Mr. Jacobson's investigation into and documentation of her depression and personality disorder through three psychiatrists, was sufficient investigation into the only line of defense to allow him to choose to present the defense he presented. (App. 93a) In the court's view, Mr. Jacobson's representation was effective, because he was under no duty to follow a line of inquiry "until it bears fruit or until all conceivable hope withers." See Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980).

With this analysis, however, the district court misdirected the nature of the inquiry necessary to gauge counsel's effectiveness in investigating Ms. Barfield's available psychiatric defenses. Despite Mr. Jacobson's considerable flurry of investigation, and presentation of a number of witnesses, critically, Mr. Jacobson never understood what he had to do. While there is a limit to the investigation which effective counsel must undertake, that limit is not approached until counsel has undertaken thoughtful, well-informed investigation. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968).

Mr. Jacobson never understood the array of psychiatric issues through which he had to navigate in order to obtain a fair evaluation of his client. (MT. 411-412) He never understood his client, and he consequently never understood the critical importance of having his client talk openly and honestly with psychiatrists. (MT. 261, 305-311) Mr. Jacobson himself never questioned, or even read, the medical records of Ms. Barfield, which would have led him to question further the fairness and completeness of the evaluations of Ms. Barfield by the court-appointed psychiatrists. In sum, because Mr. Jacobson failed to undertake reasonably well-informed investigation, he accepted the appointed psychiatrists' evaluations at face value and proceeded unquestioningly -- mechanically -- to present their opinions at

trial. And those opinions demonstrated that nothing in his client's mental or emotional complex detracted from her ability to intend what she did intelligently and voluntarily.

With the kind of investigation described by Dean Ackerman (MT. 411-412) and demonstrated through the work with Dr. Selwyn Rose (MT. 298-311), Mr. Jacobson could, at the very least, have presented expert opinion testimony which concluded that Ms. Barfield's mental health was so impaired that she could not conform her behavior to the requirements of law. With such investigation, he would not have been left with the "tactical choice" of presenting nothing in support of a psychiatric defense, as he did. Under these circumstances, it simply cannot be said in good faith that Mr. Jacobson conducted reasonably effective investigation. Moreover, it cannot be said that Ms. Barfield was not substantially disadvantaged by the presentation of a psychiatric "defense" which confirmed that she was fully responsible under the requirements of law for her actions.

Mr. Jacobson's failure to investigate character evidence on behalf of Ms. Barfield likewise was based upon his uninformed development of her case. Mr. Jacobson simply decided, apparently arbitrarily,

> that we would concentrate on her drug abuse and present the case in a fashion to show that she was all right up until the time her first husband died and that from there it was downhill.

(MT. 232) Mr. Jacobson never did interview persons of the sort who testified at Ms. Barfield's post-conviction hearing in order to come to this conclusion on the basis of investigation. (MT. 121-123; 90-92) Rather, he simply decided that the focus would be on the drug-abuse period. (MT. 232) Thus, his effectiveness depends on whether that decision, and the assumption underlying it, were reasonable. See Washington v. Strickland, 693 F.2d at 1255-1256 and cases cited therein.

Under the circumstances of Ms. Barfield's case, that decision was not reasonable. Apparently the assumption underlying it was, as argued by respondents before the fourth circuit panel, that such character witnesses "would have been only complimentary [sic] to the main thrust of her mitigational

argument -- drugs." (App.Br. 42) But this is not so. While the character evidence available would have complemented the drug defense, it would have done much more than that: it would have put the drug defense into a meaningful, mitigating context. Without the character evidence, the drug defense did little to explain why Ms. Barfield's life should be spared. However, with such evidence, the drug defense was put into the dynamic context of a life which had come to the end demonstrated to the jury through a human tragedy. Through her fatal inability to cope with the various tragedies which befell her, Velma Barfield went from being not just an ordinary person, but from being a "very fine person in the community," "a very good and reliable employee," "a very good loving person," in short, from being a "remarkable person," see MT. 319-334, 514-610, to the kind of person presented to the jury, who was able to administer poison to a human being and who was unable to live from one moment to the next without an extraordinary infusion of drugs. Far from just "complimentary" to the drug defense, this information was vital to that defense. Without presenting it, Mr. Jacobson substantially disadvantaged Ms. Barfield's chance to live because he excluded "from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind." Woodson v. North Carolina, 428 U.S. at 304.

Accordingly, Mr. Jacobson's "choice" to investigate and present none of the available character evidence for Ms. Barfield was uninformed and unreasonable, just as his "choice" to put on a psychiatric defense through the use of experts who believed his client to be completely responsible for her actions was uninformed and unreasonable. Because nearly identical uninformed and unreasonable choices are now being evaluated by the Court in Strickland, certiorari should be granted, and Ms. Barfield's case should be decided along with Strickland.

CONCLUSION

For the reasons set forth herein, petitioner requests that the Court grant her petition and set aside her conviction and sentence of death.

Respectfully submitted,

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No. 83-6610

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MARGIE BULLARD BARFIELD,

Petitioner,

v.

KENNETH W. HARRIS, Superintendent,
North Carolina Correctional Center
for Women, and RUFUS L. EDMISTEN,
State of North Carolina,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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I N D E X

Margie Bullard BARFIELD, Appellant,

v.

Kenneth W. HARRIS, Supt., N.C. Correctional Center for Women; Rufus L. Edmisten, Attorney General of N.C., Appellees.

No. 83-6424.

United States Court of Appeals, Fourth Circuit.

Argued March 8, 1983.

Decided Oct. 3, 1983.

Appeal was taken from a judgment of the United States District Court for the Eastern District of North Carolina, Franklin T. Dupree, Jr., Chief Judge, 540 F.Supp. 451, denying habeas corpus relief. The Court of Appeals, Haynsworth, Senior Circuit Judge, held that: (1) jury's consideration of fact of petitioner's four earlier homicides as nonstatutory aggravating circumstances in capital case was at most violation of state law, and was not a violation of any federal constitutional provision; therefore, such violation did not entitle petitioner to habeas corpus relief; (2) United States Constitution does not require state court, when conducting proportionality review of death sentence, to identify pool of cases it used for comparison purposes, and to have systematic means for identifying and retrieving appropriate cases for comparison, and (3) there was no federal constitutional deficiency in manner in which North Carolina Supreme Court executed its statutory duty to conduct proportionality review of death sentence.

Affirmed.

1. Criminal Law ⇐1206.1(5)

Jury considering sentence in capital case in North Carolina may consider only statutory aggravating circumstances.

2. Habeas Corpus ⇐45.2(4)

Jury's consideration of fact of petitioner's four earlier homicides as nonstatutory aggravating circumstances in capital case was at most a violation of state law, and was not a violation of any federal constitutional provision; therefore, such violation did not entitle petitioner to habeas corpus relief.

3. Criminal Law ⇐998.2(1)

Jury consideration of nonstatutory aggravating factors, as long as they relate to character of defendant and to crime he committed, does not violate United States Constitution.

4. Criminal Law ⇐1206.2(2)

United States Constitution does not require state court, when conducting proportionality review of death sentence, to identify pool of cases it used for comparison purposes, and to have systematic means for identifying and retrieving appropriate cases for comparison.

5. Criminal Law ⇐1206.2(2)

There was no federal constitutional deficiency in manner in which North Carolina Supreme Court executed its statutory duty to conduct proportionality review of death sentence.

Richard H. Burr, III, West Palm Beach, Fla. (James D. Little, Singleton, Murray, Harlow & Little, Fayetteville, N.C., on brief), for appellant.

Richard N. League, Sp. Deputy Atty. Gen., Thomas F. Moffitt, Asst. Atty. Gen., Raleigh, N.C. (Rufus L. Edmisten, Atty. Gen. of North Carolina, Raleigh, N.C., on brief), for appellees.

Before PHILLIPS and MURNAGHAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

HAYNSWORTH, Senior Circuit Judge:

This is an appeal from a denial of habeas corpus relief to the petitioner who had been sentenced to death after a conviction of

murder by arsenic poisoning. In the guilt phase of the trial, evidence was introduced that she had similarly murdered four other persons, including her mother and former husband. Indeed, she admitted that she had poisoned all of them except her former husband.

The penalty phase of the trial was conducted before the same jury immediately after the verdict of guilty. The principal question on appeal is whether the jurors' knowledge of her former crimes impermissibly infected their decision to impose the death penalty since former criminal conduct is not a statutory aggravating circumstance in North Carolina. Another substantial question is whether or not the Supreme Court of North Carolina adequately performed its statutory duty to conduct a proportionality review of the sentence.

I.

During the guilt phase of her trial, Margie Barfield took the stand in her own defense. She admitted having put arsenic laden Terro Ant Poison in the food of the victim, Taylor. She protested, however, that she had not intended to kill Taylor. Earlier she had forged some checks on Taylor's bank account, a fact Taylor discovered when his cancelled checks were returned with his bank statement. He threatened to report her to the police if she did it again. She did it again, and was fearful that he would discover that later transgression. Hence, she wished to make him ill enough that he would not review his cancelled checks but did not wish to kill him.

In response, the prosecutor introduced evidence of the death by arsenic poisoning of the other four persons. Indeed, there was received in evidence a confession in which she admitted poisoning three of these persons, including her mother, though she denied that she had poisoned her former husband. All four bodies had been exhumed, and autopsies had disclosed that each had died of arsenic poisoning. With respect to Taylor and the other victims except the former husband, there was testimony of intense, prolonged suffering before death brought release.

The evidence of the former poisonings was received for the limited purpose of supporting the prosecutor's case that Barfield intended to kill Taylor.

The prosecutor produced no additional evidence during the penalty phase of the trial, but the defendant introduced some testimony to show her habitual overuse of prescription drugs and her need of money with which to obtain them.

At the close of the sentencing hearing, the court instructed the jury that it could consider three aggravating factors: (1) whether the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (2) whether it was designed to hinder enforcement of the law, N.C.G.S. § 15A-2000(e)(7); and (3) whether the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). The jury was further instructed to consider two mitigating circumstances: (1) whether the defendant committed the murder while under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and (2) whether the defendant possessed an impaired capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of law, N.C.G.S. § 15A-2000(f)(6). The jury was invited to consider any other circumstances it might deem to have mitigating value. In determining what aggravating and mitigating factors were present, the jury was told that it could consider "all evidence heard in both phases of the case."

The jury found beyond a reasonable doubt that all three aggravating factors were present, and that there were no mitigating circumstances.[1] In writing, the jury

1. The jury did not answer the invitation to list "other circumstances which the jury deems to have mitigating value." The more reasonable inference is that the jury found no such other mitigating circumstances. The failure of the jury affirmatively to disclose they had found no such other mitigating circumstances certainly does not suggest that the jury found some such circumstances and then failed to consider them

found beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating factors, and that the aggravating factors were sufficiently substantial to call for imposition of the death penalty. The jury recommended execution, see N.C.G.S. § 15A–2000(b) and (c). Accordingly, the trial judge imposed the death sentence.

In an extensive opinion, the North Carolina Supreme Court reviewed Barfield's numerous contentions. *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979). It found no error in either stage of Barfield's bifurcated trial. The Supreme Court of the United States denied a petition for a writ of certiorari, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980).

Thereafter, Barfield sought post-conviction relief in North Carolina and an evidentiary hearing was held, during which the testimony of many witnesses was taken. The hearing judge filed extensive findings of fact and conclusions of law and denied the requested relief. The North Carolina Supreme Court denied a petition for a writ of certiorari, and the Supreme Court of the United States again denied such a petition to it. *Barfield v. North Carolina*, 454 U.S. 967, 102 S.Ct. 494, 70 L.Ed.2d 381 (1981).

Barfield sought a federal writ of habeas corpus, but it was denied in a lengthy opinion giving meticulous attention to each of Barfield's claims. *Barfield v. Harris*, 540 F.Supp. 451 (E.D.N.C.1982).

II.

In the sentencing phase of the trial, the jury, of course, was aware of the evidence of the four earlier homicides. The North Carolina statute provides that the jury sitting in the guilt phase of the trial will be the jury in the sentencing phase, unless it cannot be reconvened. N.C.G.S. § 15A–2000(a)(2). It also provides that all of the evidence submitted in the guilt determination phase of the trial shall be competent for the jury's consideration in the sentencing phase. N.C.G.S. § 15A–2000(a)(3).

Moreover, the evidence of the four earlier homicides was relevant to the jury's consideration of the statutory aggravating circumstances. It was particularly relevant to the jury's consideration of the aggravating factor that the crime was "especially heinous, atrocious, or cruel."

There was testimony of Taylor's suffering during the few days that he survived after he was first poisoned. She took him to the hospital once where he was treated and released, apparently with no suspicion on the part of the physicians that he was suffering from arsenic poisoning. Mrs. Barfield, of course, did not tell them. He was returned to the hospital by ambulance on the day of his death when the emergency attendants found him wild. He uttered a loud scream.

The suffering of three of the earlier victims had also been described in some detail. Mr. Lee had lingered for more than a month after Mrs. Barfield first began to administer the poison to him. She not only failed to assist the physicians in the treatment of Taylor when it might have saved his life, but from her earlier experience she knew when she began to administer the poison to him that victims of arsenic poisoning suffered intense pain and distress over a considerable period of time. She must have been acutely aware of all that when she purchased the ant poison and began to administer it to Taylor in his tea and in his beer. She was under no misimpression that death from poisoning might be relatively swift or painless.

Though the jury was carefully instructed that the aggravating circumstances that they might consider were those three submitted to it and the jury's written verdict was responsive to those considerations, there is still the possibility, urged by Mrs. Barfield, that the jury considered the fact of the four earlier homicides as non-statutory aggravating circumstances. It would be remarkable if the fact of those four earlier homicides did not substantially color the

in striking a balance with the aggravating circumstances.

jurors' thinking as they performed their sentencing function.

[1, 2] A jury considering the sentence in a capital case in North Carolina may consider only statutory aggravating circumstances. *State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981). If, then, the jury did consider the four prior homicides as independent, non-statutory aggravating circumstances, there was a violation of North Carolina law. The federal courts, however, have no jurisdiction to review decisions of North Carolina's courts on matters of state law. Our jurisdiction is limited to a consideration of federal constitutional questions arising in the course of state criminal prosecutions, and a jury's consideration of non-statutory aggravating circumstances is not a violation of any provision of the federal Constitution whether or not such consideration is forbidden by state law.

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), suggests that a jury's consideration of non-statutory aggravating circumstances is not a violation of any federal constitutional provision. The suggestion became the Court's holding in *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). In *Zant*, the jury had found the existence of three statutory aggravating factors, but the statute with respect to one of those factors was subsequently held to be unconstitutionally vague. The Court held that any error was harmless, however, because the evidence used to prove the existence of the vague aggravating factor could have been considered by the jury as establishing a non-statutory aggravating factor.

The Georgia statute under consideration in *Zant* did not foreclose jury consideration of non-statutory aggravating circumstances, but *Barclay v. Florida*, — U.S. —, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), presented the precise situation with which we are met. Florida law did confine the judge, who determines the sentence in Florida, to a consideration of statutory aggravating circumstances. The judge in *Barclay* had considered the defendant's prior criminal record, which was not a statutory aggravating circumstance. Any consideration of it was a violation of state law. *Mikenas v. State*, 367 So.2d 606, 610 (Fla. 1978). The Supreme Court held that the judge's consideration of defendant's prior criminal record may have been a violation of Florida law, but it was not a violation of that defendant's Eighth and Fourteenth Amendment rights.[2]

[3] *Barclay* controls the result here. At most, there was an error in the application of state law. Jury consideration of non-statutory aggravating factors, as long as they relate to the character of the defendant and to the crime he committed, does not violate the Constitution of the United States.

III.

[4] The North Carolina Supreme Court indicated that it conducted a proportionality review of Mrs. Barfield's sentence. It said that it found the sentence neither excessive nor disproportionate in light of the manner in which the murder was accomplished and Mrs. Barfield's conduct after the administration of the poison to Taylor.[3] Neverthe-

1. The Court's holding is derived from two opinions. *See Barclay v. Florida*, at —, 103 S.Ct. at 3426-3427 (Rehnquist, J., plurality opinion) and at —, 103 S.Ct. at 3433-3434 (Stevens, J., concurring).

2. The final paragraph of its opinion, occupying twenty-one pages in the S.E.2d Reporter, reads as follows:

> We do not take lightly the responsibility imposed on us by G.S. 15A-2000(d)(2). We have combed the record before us. We have carefully considered the briefs and arguments which have been presented to us. We conclude that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it. We find nothing in the record which would suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. The manner in which death was inflicted and the way in which defendant conducted herself after she administered the poison to Taylor leads us to conclude that the sentence of death is not excessive or disproportionate considering both the crime and the defendant. We, therefore, decline to exercise

less, it is contended on behalf of Mrs. Barfield that the North Carolina Supreme Court did not identify the pool of cases it used for comparison purposes, and that it has no systematic means for identifying and retrieving appropriate cases for comparison. The Constitution of the United States, however, requires neither of those things.

Appellate review to insure that a death sentence is neither excessive nor disproportionate is of some importance in insuring that the sentence was not imposed in an arbitrary or capricious fashion.[4] Nevertheless, the Supreme Court has not required reviewing state appellate courts to identify or list the cases it used for comparison purposes. Neither in *Proffitt v. State*, 315 So.2d 461 (Fla.1975), nor *Jurek v. State*, 522 S.W.2d 934 (Tex.1975), did the state Supreme Court identify or list the cases it used for comparison purposes, but the death sentence in each case was affirmed. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Finally, in *Barclay v. Florida*, —— U.S. ——, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), the Supreme Court affirmed the death sentence though the Supreme Court of Florida did not even mention proportionality review in either of the opinions written on the two occasions that case was before the court. *Barclay v. State*, 343 So.2d 1266 (Fla.1977); *Barclay v. State*, 411 So.2d 1310 (Fla.1981).

There is little doubt that at least some of the justices are reluctant to accept conclusional findings of proportionality without a demonstration of the willingness of that state supreme court to overturn death sentences. The Supreme Court of North Carolina fully qualifies on that score.

By the time the opinion in Mrs. Barfield's case was handed down, the Supreme Court of North Carolina had handed down opinions in thirteen first degree murder cases tried under its new death penalty statute. In five of those, the death penalty had been imposed, while a life sentence had been imposed in the remaining eight cases. The death sentence imposed in each of the five cases had been stricken by the Supreme Court of North Carolina. Mrs. Barfield's was the first case in which it upheld the death sentence under the new statute. By the time Mrs. Barfield filed her petition for federal habeas corpus, the North Carolina Supreme Court had reviewed imposition of the death sentence in seventeen cases and had upheld the death sentence in only six of those cases, one of which, of course, was Mrs. Barfield's.[5]

[5] It is evident that the Supreme Court of North Carolina does take seriously its duties of appellate review of death sentences, including review for excessiveness or disproportionality. In its lengthy opinion, it addressed each of Mrs. Barfield's claims with care and patience, and we can find no federal constitutional deficiency in the manner in which it executed its appellate duties.

IV.

There was nothing arbitrary or capricious in the imposition of the death penalty in Mrs. Barfield's case. Since the North Carolina Supreme Court properly performed its

our statutory discretion to set aside the sentence imposed.

4. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 206, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1976) (Stewart, J., plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976) (Powell, J., plurality opinion).

5. The six cases in which the North Carolina Supreme Court voted to affirm the imposition of the death sentence prior to Barfield's filing of the petition for a federal writ of habeas corpus are as follows: *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 220 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980).

appellate review function, there is no basis for federal interference.

V.

Numerous other contentions are advanced on Mrs. Barfield's behalf, but all of these other contentions were more than adequately handled by the district judge in his opinion, *Barfield v. Harris*, 540 F.Supp. 451 (E.D.N.C.1982). As to those contentions, we affirm for the reasons stated by the district judge.

We find no constitutional error in either the guilt determining or sentencing phases of Mrs. Barfield's trial. We conclude that the petition for the writ of habeas corpus was properly denied.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-6424

FILED

NOV 22 1983

U. S. Court of Appeals
Fourth Circuit

Margie Bullard Barfield,

Appellant,

vs.

Kenneth W. Harris, et al.,

Appellees.

ORDER

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing en banc, and with the concurrence of Judge Phillips and Judge Murnaghan,

IT IS ORDERED that the petition be, and it is hereby denied.

The motion to exceed the page limit in the petition for rehearing is granted.

United States Senior Circuit Judge

November 22, 1983

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. --

(a) Separate Proceedings on Issue of Penalty. --

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. -- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which

outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. -- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. --

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. -- Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. -- Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c.406, s. 2.)

§ 15A-2001. Capital offenses; plea of guilty. -- Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may sentence such person to life imprisonment or to death pursuant to the procedures of G.S. 15A-2000. Before sentencing the defendant, the presiding judge shall impanel a jury for the limited purpose of hearing evidence and determining a sentence recommendation as to the appropriate sentence pursuant to G.S. 15A-2000. The jury's sentence recommendation in cases where the defendant pleads guilty shall be determined under the same procedure of G.S. 15A-2000 applicable to defendants who have been tried and found guilty by a jury. (1977, c.406, s. 2.)

§ 15A-2002. Capital offenses; jury verdict and sentence. -- If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison. (1977, c.406, s. 2.)

§ 15A-2003. Disability of trial judge. -- In the event that the trial judge shall become disabled or unable to conduct the sentencing proceeding provided in this Article, the Chief Justice shall designate a judge to conduct such proceeding. (1977, c.406, s. 2.)

connection with poisoning death of individual with whom she had been going and was sentenced to death, and defendant appealed. The Supreme Court, Britt, J., held that: (1) fact that defendant was suspected of having poisoned four others did not require appointment of additional counsel, especially as no charges were brought in connection with such deaths; (2) evidence of the other deaths, which like instant death apparently were for purpose of financial gain, was admissible; (3) it was not abuse of discretion to permit member of rescue squad to attempt to duplicate scream which victim uttered in emergency room; (4) *Miranda* warnings were not required to be repeated before four separate statements in which defendant admitted her other poisonings where such statements were part of the same interrogation and uttered in a short period of time; (5) evidence did not warrant submission of insanity defense; (6) the post-*Woodson* death penalty statute is constitutional; and (7) court declined to exercise its statutory discretion to set aside the death penalty.

No error.

1. Criminal Law ⇐641.5(2)

It is the responsibility of the state to provide an indigent defendant with counsel and the other necessary expenses of representation. G.S. § 7A-450.

2. Criminal Law ⇐641.5

Right to court-appointed counsel does not include the right to require the court to appoint more than one lawyer unless there is a clear showing that the first appointed counsel is not adequately representing the interests of the accused. G.S. § 7A-450.

3. Criminal Law ⇐641.5

In determining whether original counsel is adequately representing the accused, for purpose of appointing additional counsel, the legitimate interest that the state has in securing the best utilization of its legal resources must be considered along with the interests of the defendant. G.S. § 7A-450.

STATE of North Carolina

v.

Margie Bullard BARFIELD.

No. 12.

Supreme Court of North Carolina.

Nov. 6, 1979.

Defendant was convicted before the Superior Court, Bladen County, Henry A. McKinnon, Jr., J., of first-degree murder in

Cite as, N.C., 289 S.E.2d 310

4. Criminal Law ⇐641.5

Although at an early stage of the proceeding appointed counsel learned that defendant was suspected of having committed at least four other murders by poisoning, denial of motion for additional counsel was not error where no charges were brought in connection with such deaths, although the State introduced evidence at trial tending to show that defendant was involved in such deaths, especially since appointed counsel gave defendant high quality representation. G.S. § 7A-450.

5. Criminal Law ⇐115, 139

Statutory power of the court to change the venue of a trial is limited to transferring the case to an adjoining county in the judicial district or to another county in an adjoining judicial district; however, the court of general jurisdiction, such as superior court, has inherent authority to order a change of venue in the interests of justice. G.S. § 15A-957.

6. Criminal Law ⇐121, 1150

Motion for change of venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal in the absence of a showing of abuse of discretion. G.S. § 15A-957.

7. Criminal Law ⇐139

Although defendant, charged in Robeson County, moved for change of venue to western part of the state, there was no abuse of discretion in initially moving the case to Scotland County and then to Bladen County when it was determined that there were only four weeks of criminal superior court schedule for Scotland County during the year and at session during which defendant was scheduled to be tried there were approximately 20 persons confined to jail awaiting trial at that session and there was no suggestion that newspaper publicity in Robeson and surrounding counties was anything more than general in nature and likely to be found in any jurisdiction. G.S. §§ 15A-701 et seq., 15A-957.

8. Criminal Law ⇐122

In transferring case from county to which it had been moved because of pretrial publicity in county in which offense occurred the trial court, in view of Speedy Trial Act, had to consider the rights of the 20 other defendants awaiting trial in such county as well as the rights of defendant. G.S. §§ 15A-701 et seq., 15A-957.

9. Criminal Law ⇐586, 1151

A motion for a continuance is ordinarily addressed to the sound discretion of the court and will not be disturbed on appeal absent a showing of abuse.

10. Criminal Law ⇐1151

When a continuance motion is based on a right guaranteed by the State or Federal Constitutions, the question is not one of discretion but one of law and is reviewable on appeal.

11. Criminal Law ⇐594(4)

Denial of motion for continuance because one of defendant's witnesses, a doctor, was hospitalized was not abuse of discretion, especially since testimony of physician was obtained and presented before the jury by way of deposition because physician was suffering from tuberculosis and was not expected to be able to return to his office until a month after case was scheduled for trial. G.S. § 8-74.

12. Criminal Law ⇐1152(2)

Jury ⇐131(13)

A motion for individual voir dire is addressed to the sound discretion of the court and will not be disturbed except for an abuse of discretion.

13. Criminal Law ⇐1158(3)

Trial court's refusal to grant motion for individual voir dire of each juror and sequestration of jurors during voir dire would not be disturbed absent any showing of a domino effect, i. e., juror after juror professing an aversion to death penalty in order to be relieved of jury duty.

14. Criminal Law ⇐1166.17

Jury ⇐108

Unless a veniremen is irrevocably committed before the trial begins to vote against the death penalty regardless of

what the facts and circumstances might prove to be from the evidence adduced at trial, he can not be excused; if a venireman who is not so committed is improperly excluded, any subsequently imposed death penalty cannot stand.

15. Jury ⇐186

A prospective juror is properly excused for cause when his answers on voir dire concerning his attitudes toward the death penalty, although equivocal, show when considered contextually that regardless of the evidence he would not vote to convict defendant if conviction meant imposition of the death penalty.

16. Jury ⇐186

Although taken by themselves, answers of prospective jurors seem to be equivocal or contradictory, such jurors were not improperly excused from capital felony trial on ground that they were merely ambivalent to the death penalty where, taken as a whole, voir dire indicated opposition to the death penalty so strong that they could not vote to impose it regardless of the evidence, in that in responding to questions by the court each indicated that no matter what aggravating circumstances were established by the evidence he or she could not vote to impose a death sentence.

17. Criminal Law ⇐369.1, 369.2(1)

Evidence that a defendant has committed other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged, but if it tends to prove any other relevant fact it will not be excluded merely because it also shows guilt of another crime.

18. Criminal Law ⇐369.1

Rule governing inadmissibility of other offense evidence where only relevancy is to show bad character or disposition to commit crime, is predicated on the law's desire to preserve for the accused in an unencumbered state the presumption of innocence which is at the heart of every criminal prosecution.

19. Criminal Law ⇐369.1

Rule governing admissibility of evidence of other offenses operates to protect defendant from the surprise introduction of extraneous matters which are unduly prejudicial because their probative value is outweighed by the danger that the issues before the jury will be confused and the trial's length will be prolonged.

20. Criminal Law ⇐370

Evidence that a defendant committed other offenses is relevant to establish a defendant's knowledge of a given set of circumstances when such a set of circumstances is logically related not only to the crime for which defendant is on trial but also is logically related to the extraneous offenses.

21. Criminal Law ⇐370

Where defendant's testimony from the stand was at odds with the clear implication of statement which she had given to deputies, i. e., that she knew the fatal properties of insecticide which she administered to victim, evidence relating to poisoning death of four other individuals was admissible to show that defendant knew the probable consequences of her actions when she administered the poison to instant victim and such was especially relevant in view of defense of not guilty by reason of insanity.

22. Criminal Law ⇐48

Test of insanity as a defense to a criminal charge is whether the accused, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act, or, if he does know this, was by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such acts.

23. Criminal Law ⇐48

For a defendant to know the nature and quality of his act, for purpose of insanity defense, he must have understood the physical nature and consequences of that act.

24. Criminal Law ⇐371(4)

Evidence that defendant poisoned four individuals in addition to individual whose death was at issue was relevant for purpose of showing her intent, in that she had a pattern of administering poison to persons, knowing full well the probable consequences of her actions, especially since defendant was charged with first-degree murder.

25. Criminal Law ⇐371(1)

Evidence of other offenses is properly admitted whenever it is necessary to prove that a defendant had a specific intent or that a particular act was done intentionally rather than accidentally.

26. Criminal Law ⇐371(4)

Although homicide which is committed by use of poison does not differ in its substantive elements from homicide committed by other means, the deliberative features which usually attend the use of poison have historically caused the courts to receive evidence of its prior uses in order to show intent.

27. Criminal Law ⇐369.2(4)

Evidence of prior poisoning is clearly relevant in a prosecution for first-degree murder in that the state must prove a specific intent to kill if it is to win a conviction.

28. Criminal Law ⇐371(12)

Evidence of other offenses is relevant to establish a defendant's motive in engaging in criminal conduct.

29. Criminal Law ⇐371(12)

Evidence tending to show that defendant poisoned three other individuals only after forgery of their names was discovered or when defendant became fearful of discovery was admissible, on issue of motive, in prosecution for poisoning death of individual whose name defendant had forged to several checks.

30. Criminal Law ⇐372(4)

Evidence tending to show that defendant had poisoned several other individuals whose names she had forged to various documents was admissible in prosecution for poisoning death of individuals whose name defendant had forged to several checks since such evidence tended to establish the existence of continuing plan or scheme, in that defendant used proceeds of the forgeries to support her drug addiction, with the State further showing that in all but one instance the deaths were preceded by conduct which resulted in pecuniary gain.

31. Criminal Law ⇐372(1)

Evidence of other offenses is admissible if it tends to show the existence of a plan or design to commit the offense charged, or to accomplish a goal of which the offense charged is a part or toward which it is a step.

32. Criminal Law ⇐372(1)

Other offense evidence, when offered to show existence of a plan or design to commit the offense charged, ought to be examined with special care to see that it is really relevant to the establishment of a design or plan rather than merely showing character or a disposition to commit the offense charged.

33. Criminal Law ⇐372(1)

Mere similarity in results is not a sufficient basis on which to receive evidence of other offenses; instead, there must be such a concurrence of common features that the assorted offenses are naturally explained as being caused by a general plan.

34. Criminal Law ⇐369.2(1)

Requirement that there be more than similarity in result before evidence of other offenses is admissible is grounded in the proposition which underlies much of the law of criminal evidence: the prosecution ought not to be able to introduce evidence of other criminal offenses unless it is relevant for some other purpose than to show that defendant is guilty because he has a criminal disposition.

35. Criminal Law ⇐722½

Since evidence of poisoning death of four other individuals was properly admitted as components of the State's case, it was not error for the district attorney to

refer to them in his argument before the jury.

36. Criminal Law ⇐726(1)

While it is true that an attorney may not travel outside of the record and inject into his argument facts which are not in evidence, there is no prohibition against an attorney making reference in his argument to evidence which has been properly admitted.

37. Criminal Law ⇐633(1)

Every criminal defendant is entitled to have a fair trial which is conducted before an impartial and unprejudiced jury in an atmosphere of calm deliberation.

38. Criminal Law ⇐633(1)

Obligation to take steps to assure a defendant's right to a fair trial rests on the shoulders of both the presiding judge and the district attorney.

39. Criminal Law ⇐700

Obligation of the district attorney to conduct himself in such a manner as to assure the right to a fair trial in no way lessens his obligation to the state to prosecute criminal charges to the best of his abilities on the basis of the evidence that he is able to bring before the jury.

40. Criminal Law ⇐713

Counsel is given wide latitude in the argument of hotly contested trials, subject to the exercise of the sound discretion of the presiding judge.

41. Criminal Law ⇐706(4)

District attorney has the right and duty to cross-examine vigorously a defendant who takes the stand in his own defense.

42. Criminal Law ⇐700

District attorney's performance of his duties as public prosecutor is tempered by his obligation to defendant to assure that he is afforded his right to a fair trial.

43. Criminal Law ⇐706(3)

Prosecutor may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters; such rule is violated by asking questions which are phrased impertinently or insultingly so as to badger or humiliate a witness.

44. Criminal Law ⇐706(2)

District attorney may not place before the jury any evidence whose only effect is to excite prejudice or sympathy; test is whether the evidence tends to shed any light on the subject matter of the inquiry or has as its only effect the exciting of prejudice or sympathy.

45. Criminal Law ⇐663

Conditions under which courtroom demonstrations are performed must correspond in all essential particulars with those existing at the time and place of the event.

46. Criminal Law ⇐663

Circumstances surrounding a courtroom demonstration need not be identical with those existing at time and place of the event depicted, as a reasonable or substantial similarity is sufficient, and so long as such touchstone is met, the weight to be given the demonstration is for the jury.

47. Criminal Law ⇐663

Degree of similarity between a courtroom demonstration and circumstances existing at time and place of events sought to be depicted is a question on which the trial judge must exercise his discretion in evaluating.

48. Criminal Law ⇐663

It was not abuse of discretion to permit member of rescue squad to attempt to duplicate scream which poisoning victim uttered in hospital emergency room where witness was present and demonstration served to complete his accounts of the condition of victim before he died and the pain he was experiencing.

49. Criminal Law ⇐663

Any demonstration in some sense and to some degree breaches the customary decorum of the courtroom, and it is only with great caution that such decorum should be breached, which caution is allowed for when the demonstration is necessary to allow the trier of fact to fully understand the facts and circumstances of the case.

Cite as, N.C., 388 S.E.2d 516

88. Criminal Law ⇐442(7), 1170½(3)

Where physician testified that he had never treated an arsenic case, prosecutor's next question, "Is that to say arsenic is more or less exotic or not"? was improper as calling for an opinion on part of the witness who had not been properly qualified and offered as an expert competent to state an opinion; however, there was no prejudice since witness did not have an opportunity to answer as timely objection was sustained.

91. Homicide ⇐166(10)

Testimony of victim's daughter that victim was accustomed to carrying large sums of money in his wallet and that on her examination after death the daughter found only $2 in the wallet was relevant on issue of defendant's motive in allegedly poisoning victim and was competent as the witness was testifying as to facts within her personal knowledge.

92. Criminal Law ⇐419(1), 448(4)

Attempt to have poisoning victim's daughter testify as to what she had been told as to what defendant had received from victim's estate and as to her assumptions as to what defendant had received was properly precluded.

93. Criminal Law ⇐706(3)

There is nothing in the law of evidence which serves to prevent an attorney from persisting in his efforts to obtain competent evidence from a witness.

94. Criminal Law ⇐706(2)

Although objections were properly sustained to prosecutor's attempts to have poisoning victim's daughter testify as to what defendant had received from victim's estate, prosecutor's repeated endeavors in such regard did not rise to level of improper prosecution absent an indication that he was badgering his own witness or any suggestion that questions were not asked in good faith.

95. Criminal Law ⇐706(4)

There was no prejudice in prosecutor's cross-examining defendant as to whether she had poisoned another named individual where it was only after defendant gave negative answer that an objection was made and prosecutor did not accuse defendant of poisoning such individual and did not pursue the matter.

96. Criminal Law ⇐1171.8(1)

Assuming that prosecutor's inquiry as to reason defendant had poisoned another was because the latter was "just a cantankerous old lady to live with" was improper as a breach of courtroom decorum, in light of the overall conduct of the trial and the evidence otherwise presented against defendant, there was no prejudice.

97. Criminal Law ⇐404(1)

"Real evidence" is that evidence which is provided by producing for inspection at trial a particular item rather than having witnesses describe it.

See publication Words and Phrases for other judicial constructions and definitions.

98. Criminal Law ⇐404(4)

A two-pronged foundation must be laid before real evidence is properly received: first, the item offered must be identified as being the same object involved in the incident at issue and, second, it must also be shown that since the incident in which it was involved, the object has undergone no material change in its condition.

99. Criminal Law ⇐404(4)

Trial judge possesses and must exercise sound discretion in determining the standard of certainty that is required to show that the object offered is the same object involved in the incident in issue and that the object is in an unchanged condition.

100. Criminal Law ⇐404(4)

Where defendant gave statement that after poisoning one individual she threw poison bottle in field at back of house and investigating officer testified that he recovered a bottle of rat poison from such field, initialed it and kept it in his sole possession from time of recovery until time of trial, with no one else having access thereto, it was not abuse of discretion to admit the bottle, notwithstanding contention that more than one year had elapsed from time

it was allegedly thrown into the field until its recovery.

61. Criminal Law ⇐444

It was not abuse of discretion to receive various checks which defendant was alleged to have forged on homicide victim's account where victim's daughter identified six checks bearing her initials for identification as being checks containing signature of her father, with daughter then being shown three other checks which she identified as not bearing the authentic signature of her father, where supervisor of questioned documents section State Bureau of Investigation testified that signatures which appeared on the second group of checks were not made by the same individual who made his initials on the first group of checks.

62. Criminal Law ⇐468

A lay person is competent to state an opinion as to the handwriting of a individual provided that the witness is familiar with the handwriting of that person.

63. Criminal Law ⇐444

Where poisoning victim's daughter identified check payable to Internal Revenue Service and bearing her mother's signature as being a check which she had written out for her mother and which the latter had signed in her presence the morning after her father, the victim, had been taken to hospital and also identified a check payable to supermarket as not bearing the authentic signature of her mother such was a sufficient foundation for admission of the checks.

64. Criminal Law ⇐468

Showing that each doctor who stated an opinion as to cause of death of poisoning victim was a qualified pathologist and that his opinion was based on autopsy performed on the victim was sufficient foundation for admission of their opinions.

65. Criminal Law ⇐481, 1153(2)

Competency of a witness to testify as an expert is a matter addressed to the discretion of the trial court judge and will not be disturbed on appeal if there is evidence in the record to support his finding.

66. Criminal Law ⇐1144.12

Absence of an express finding in the record that a witness is qualified as an expert is not ground for challenging the ruling implicitly made by a trial judge in allowing a witness to testify, since if the record indicates that such a finding could have been made it will be assumed that the judge properly found the witness to be an expert, or that his competency was admitted, or that no question was raised in regard to his competency.

67. Criminal Law ⇐414

Required fact-finding on a motion to suppress must include findings on the issue of voluntariness of the statement. G.S. § 15A-977(f).

68. Criminal Law ⇐414

When evidence on a motion to suppress a statement is conflicting, the findings of fact must be sufficient to provide a basis for the judge's ruling. G.S. § 15A-977(f).

69. Criminal Law ⇐1158(4)

Fact-findings on a motion to suppress a statement are conclusive if supported by competent evidence. G.S. § 15A-977(f).

70. Criminal Law ⇐412.2(3)

Repetition of *Miranda* warnings was not required before defendant made four separate statements to interrogating officers concerning her involvement in deaths of four individuals where she had been warned of her rights prior to commencement of interrogation and waived such rights and the statements were made in space of a relatively short time and to the same officer who had given the warnings and in the same location.

71. Criminal Law ⇐412.2(3)

Repetition of *Miranda* warnings is not required where no inordinate time elapses between interrogations, the subject matter remains the same and there is no evidence that anything occurred in the interval which would serve to dilute the effect of the first warning.

72. Criminal Law ⇐412.2(3)

Need for a repetition of *Miranda* warnings must be determined by the totality of the circumstances.

73. Criminal Law ⇐412.2(3)

Factors relevant to need for repetition of *Miranda* warnings are: length of time between giving of first warnings and subsequent interrogation; whether the warning and subsequent interrogation occurred in the same or different places; whether the warnings and subsequent interrogation were conducted by the same or different officers; the extent to which the subsequent statement differed from any previous statements; and the apparent intellectual and emotional state of the suspect at time of the interrogation.

74. Criminal Law ⇐412.2(3)

Although there was evidence that defendant had consumed a large quantity of drugs on morning on which she made four separate statements indicating her complicity in four poisoning deaths, repetition of *Miranda* warnings prior to each statement was not required absent evidence suggesting that at time of interrogation defendant was under influence of any substance; fact that defendant was crying and otherwise visibly upset at time of questioning did not by itself prove that she was not sober or otherwise cognizant of what was happening.

75. Criminal Law ⇐311

Every person is presumed to be sane and to possess the sufficient degree of reason to be responsible for his crimes.

76. Criminal Law ⇐331

Burden is on defendant to prove the defense of insanity to the satisfaction of the jury.

77. Criminal Law ⇐740

A trial judge does not err in failing to place the issue of insanity before jury where there is no evidence produced at trial that would tend to show that a defendant was insane at time of commission of the alleged offense.

78. Criminal Law ⇐740

Refusal to submit defense of insanity was not error where all three of the psychiatrists who testified concluded that defendant knew the difference between right and wrong and that there was no evidence that she did not know the nature and quality of her acts.

79. Criminal Law ⇐1213

Death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment. G.S. § 15A-2000 et seq.; U.S.C.A.Const. Amends. 8, 14.

80. Criminal Law ⇐1213

To pass scrutiny under the Eighth Amendment, a penalty must accord with the dignity of man which is the underlying concept of the Amendment. U.S.C.A.Const. Amends. 8, 14.

81. Criminal Law ⇐1213

At the very least, the Eight Amendment's proscription on cruel and unusual punishment means that the punishment must not be excessive. U.S.C.A.Const. Amends. 8, 14.

82. Criminal Law ⇐1208(1)

Whether a penalty is excessive must be determined in light of two considerations: first, a penalty may be excessive and unconstitutional if it makes no measurable contribution to acceptable goals of punishment and is nothing more than the needless and purposeless imposition of pain and suffering and, second, the punishment must not be grossly out of proportion to the severity of the crime. U.S.C.A.Const. Amends. 8, 14.

83. Criminal Law ⇐1208

In determining whether a penalty is excessive courts must give attention to public attitudes concerning a particular penalty as deduced from history and precedent, legislative action, and the conduct of juries. U.S.C.A.Const. Amends. 8, 14.

84. Criminal Law ⇐1208(1)

Death penalty statute, as enacted in response to the *Woodson* decision, which struck down as unconstitutional the then-

existing death penalty statute as applied, is not unconstitutional as being mandatory in nature since it provides for exercise of guided discretion in the imposition of sentence. G.S. §§ 14-17, 15A-2000 et seq.; U.S.C.A. Const. Amends. 8, 14.

85. Criminal Law ⇐1208(1)

Sentencing statutes are by necessity somewhat general; while they must be particular enough to afford fair warning to defendant of the probable penalty which would attach on a finding of guilt, they must also be general enough to allow the courts to respond to the various mutations of conduct which society has judged to warrant the application of the criminal sanction.

86. Constitutional Law ⇐268(7)

Due process requires the state to bear the burden of proving beyond a reasonable doubt each element of a substantive criminal offense. U.S.C.A.Const. Amend. 14.

87. Constitutional Law ⇐268(7)

Due process does not require that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses which are related to the culpability of an accused. U.S.C.A. Const. Amend. 14.

88. Constitutional Law ⇐268(7)

Due process does not require a state to disprove beyond a reasonable doubt the existence of the factor which mitigates the degree of criminality or punishment. U.S. C.A.Const. Amend. 14.

89. Constitutional Law ⇐268(7)
Criminal Law ⇐1208(1)

Death penalty statute is not unconstitutional on ground that due process requires the state to bear the burden of proof that in a given case no mitigating circumstances exist. G.S. § 15A-2000(c); Code Ga.1967, § 27-2534.1(b); U.S.C.A.Const. Amend. 14.

90. Criminal Law ⇐1208(2)
Homicide ⇐354

Supreme Court declining to exercise its statutory discretion to set aside death penalty, as imposed on conviction of first-degree murder based on arsenic poisoning to prevent victim from reporting defendant's forgery of checks drawn on victim's account, where there was sufficient evidence supporting aggravating circumstances that murder was committed for pecuniary gain, was committed to hinder enforcement of the law and was especially heinous, atrocious or cruel and that sentence was not imposed under influence of passion, prejudice or any other arbitrary factor; manner in which death was inflicted and way in which defendant conducted herself after the poisoning warranted conclusion that death sentence was not excessive or disproportionate considering both the crime and defendant. G.S. § 15A-2000(d)(2).

Upon pleas of not guilty and not guilty by reason of insanity, defendant was tried on a bill of indictment which charged her with the murder of Stewart Taylor. The trial was conducted in the bifurcated manner mandated by G.S. § 15A-2000 et seq. Phase one of the trial determined the guilt or innocence of defendant. Phase two of the trial was held to decide her sentence for first-degree murder following her conviction on that charge.

During the guilt determination phase of the trial, the State introduced evidence summarized in pertinent part as follows:

Prior to January 1978, defendant and Stewart Taylor had been going together. On occasion, defendant stayed with Taylor at his home in St. Pauls, North Carolina. At the time of his death, Taylor was fifty-six years old. He had been in fairly good health until the evening of 31 January 1978, four days before his death. On that evening, defendant and Taylor went to Fayetteville to attend a gospel sing. While at the performance, Taylor became ill. The couple left and returned to St. Pauls. At approximately 2:30 the following morning, Taylor began vomiting and having diarrhea. He continued to be ill throughout the day.

On the next day defendant took Taylor to Southeastern General Hospital in Lumber-

ten where he was treated. At the time he was examined by an emergency room physician, Taylor was complaining of nausea, vomiting and diarrhea, as well as general pain in his muscles, chest and abdomen. His blood pressure was low. His pulse was weak and rapid. He was dehydrated and his skin was ashen in color. After receiving intravenous fluids and vitamins, as well as other treatment, Taylor was released from the hospital and defendant took him back to his home in St. Pauls where she fed him.

The next day, 3 February 1978, an ambulance was summoned to Taylor's home. The attendants found him to be in great pain. His blood pressure was very low, his breathing was rapid, and his skin was gray. During the trip to the hospital, Taylor was restless and moaning. While he was in the emergency room, he was given intravenous fluids. A tracheotomy was performed but he died in the emergency room approximately one hour after he was brought in. One of the attending physicians, Dr. Richard Jordan, was "not satisfied" as to the precise cause of death. After talking with two of the attending physicians, members of Taylor's family requested that an autopsy be performed.

The autopsy was performed by Dr. Bob Andrews, a pathologist. During the course of the autopsy, toxicological screenings were performed on samples of Taylor's liver and blood. Though the normal human body contains no arsenic in the blood or in liver tissue, Taylor's blood was found to have an arsenic level of .13 milligrams percent. His liver had an arsenic level of one milligram percent. These findings led Dr. Andrews to conclude that Taylor died from acute arsenic poisoning.

On 10 March 1978, Robeson County Deputy Sheriffs Wilbur Lovette and Al Parnell talked with defendant at the Sheriff's Department in Lumberton. After having been given her *Miranda* warnings, defendant executed a written waiver indicating that she understood what her rights were and that she was willing to make a statement as well as answer questions without the presence of an attorney. The conversation between defendant and the deputies related to a number of checks that had been forged on the account of Stewart Taylor. During the interview, the officers produced a check dated 31 January 1978 in the amount of $900.00. Defendant stated that she had seen the check before; that she had cashed the check; and that while she had "filled out" the check it was signed by Taylor himself. While she talked with the officers, defendant produced two checks from her pocketbook which were dated 4 November 1977 and 28 November 1977. Both checks were drawn on Taylor's checking account and were payable to her. They were in the amounts of $100.00 and $98.00, respectively.

The State introduced evidence obtained through handwriting analysis which tended to show that the three checks were not written by Stewart Taylor; and that the checks had been cashed by defendant at a branch of First Union National Bank in Lumberton. During the interview with the deputies, defendant denied that she had forged any checks on Taylor's account.

Defendant was asked by the officers if she knew the cause of Taylor's death. Upon being told that the autopsy had indicated that arsenic poisoning was the cause of Taylor's death, defendant began crying, stating that "You all think I put poison in his food." She then proceeded to deny that she was in any way involved with Taylor's death. After making that denial, defendant was taken home. The investigation continued through the weekend.

On Monday, 13 March 1978, defendant returned to the sheriff's department accompanied by her son, Ronald Burke. After she was again advised of her constitutional rights, she executed another written waiver. She then made a lengthy statement in the presence of Deputies Lovette and Parnell.

In her statement, she admitted that before 1 January 1978 she had forged some checks on Taylor's account which he found out about, when his bank statements came in the mail; that upon finding out about the forgeries, Taylor talked with her and

threatened to "turn her in" to the authorities; that she forged another check on Taylor's account on 31 January 1978; that the forgery bothered her because Taylor would find out about it; that on that day, she and Taylor went to Lumberton because she had an appointment with her doctor; that after they left the doctor's office, they stopped at a drug store ostensibly for her to purchase some hair spray; that instead she purchased a bottle of Terro Ant Poison; that the next day, 1 February 1978, she put some of the poison in Taylor's tea at lunchtime; and that later that same day, she put more of the substance in Taylor's beer.

Defendant told the officers that she felt sure that what she had done was wrong but that she had not told anyone at the hospital about it on the two occasions that Taylor had been taken there for treatment. She stated that she gave Taylor the poison because she was afraid that he would "turn her in" for forgery. She further stated that she used the money she got out of the 31 January check to pay bills for doctors and medicine. She concluded by confessing that she had given poison to other persons besides Taylor and that they too had died.

Deputy Lovette then advised defendant that there was a possibility that a number of bodies would be exhumed. He asked her if arsenic would be found in the bodies. When she answered affirmatively, Deputy Lovette asked her in which bodies arsenic would be found.

Defendant admitted that while she lived and worked in the home of John Henry Lee as a housekeeper and nurse's aide in early 1977 she found a checkbook for an account in the joint names of Lee and his wife, Record; that she wrote a check on the account in the amount of $80.00; that Mr. and Mrs. Lee found out about the forgery and asked her about it; that she then purchased a bottle of poison, pausing to read the label which said "May be fatal if swallowed" and that she gave Mr. Lee poison three times—once in his tea and twice in his coffee.

The state introduced other evidence which tended to show: On or about 28 April 1977 Mr. Lee, 80 years old, became ill. Until then he had been in good health and attended to numerous chores around his home. On 29 April 1977, he was taken to the hospital complaining of vomiting and diarrhea. Though he was released from the hospital on 2 May 1977, he continued to be ill throughout the month of May, complaining of vomiting, diarrhea, and general pain through his body. On 3 June 1977, he was taken to the hospital again where the attending physician, Dr. Alexander, observed that he was critically ill. Deep blue in color, his skin was cold and wet with perspiration. He was confused and unresponsive and his blood pressure was subnormal. On 4 June 1977 he died.

Though no autopsy was performed at the time of Mr. Lee's death, his body was exhumed pursuant to a court order on 18 March 1978 and taken to the office of the Chief Medical Examiner in Chapel Hill where an autopsy was performed. Toxicological screenings revealed that the liver contained an arsenic level of 2.8 milligrams percent and the muscle tissue contained an arsenic level of 0.3 milligrams percent. Dr. Page Hudson, Chief Medical Examiner of the State of North Carolina, testified that in his opinion Mr. Lee's death was caused by arsenic poisoning.

Defendant admitted to the officers that she had poisoned Mrs. Dolly Taylor Edwards; that in early 1976 she moved into the home of Mr. and Mrs. Montgomery Edwards in Lumberton as a live-in helper; that Mr. Edwards died on 20 January 1977; that in late February 1977 she drove to St. Pauls where she purchased a bottle of poison; that she noticed on the bottle the words "Could be fatal if swallowed"; that returning home she put some of the poison in Mrs. Edwards' coffee and cereal; and that shortly afterwards Mrs. Edwards became ill, suffering from nausea and general weakness in her body.

The state introduced evidence that Mrs. Edwards was taken to the hospital on 27 February 1977, was treated and released. Her condition did not improve and she was again taken to the hospital on 1 March 1977

where she died later that evening. The attending physician, Dr. Henry Neill Lee, Jr., testified that Mrs. Edwards was dehydrated and suffered from nausea, diarrhea, and vomiting.

In her statement to the deputies, defendant said that she knew that the poison was responsible for the death of Mrs. Edwards; that after Mrs. Edwards died, she threw the bottle of poison into a field behind the Edwards residence; and that she did not know why she gave the poison to Mrs. Edwards.

Officer Lovette testified that during the course of his investigation he went to the field behind the Edwards home and found an empty bottle of Singletary's Rat Poison which still bore the original label. He initialed the bottom of the bottle and kept it in his sole possession until the time of trial.

Though no autopsy was performed on the body of Mrs. Edwards at the time of her death, pursuant to a court order, her body was exhumed on 18 March 1975 and sent to the Office of the Chief Medical Examiner in Chapel Hill where an autopsy was performed. During the autopsy, toxicological screenings were conducted on samples of Mrs. Edwards' liver tissue and muscle tissue. In the liver tissue, there was found an arsenic level of 0.4 milligrams percent. In the muscle tissue, there was found an arsenic level of .06 milligrams percent. Dr. Page testified that in his opinion Mrs. Edwards' death was caused by arsenic poisoning.

Defendant further admitted in her statement to the deputies that she had poisoned her mother, Lillie McMillan Bullard; that during 1974 she lived with her mother in Parkton, N. C.; and that while she lived with her mother she forged her mother's name to a note in favor of the Commercial Credit Company of Lumberton. (Other testimony indicated that the note was in the amount of $1,048.00.) She further told the deputies that she was afraid that her mother would find out about the note; that she bought a bottle of poison and the bottle bore the warning "Can be fatal if swallowed"; that one day at dinnertime she put some of the poison in some soup and a soft drink and gave both to her mother; that later in the evening on the same day she gave her mother a soft drink which contained a dose of the poison; that Mrs. Bullard began to vomit and have diarrhea; and that she was taken to Cape Fear Valley Hospital in Fayetteville on 30 December 1974 where she died shortly after her arrival.

The attending physician, Dr. Weldon Jordan, testified that Mrs. Bullard was restless and gasping for breath when she was brought into the hospital; that she was in shock; and that he was unable to discern any blood pressure.

Upon the death of Mrs. Bullard, an autopsy was performed with the permission of her family, including defendant. No toxicological screenings were conducted at that time. Pursuant to a court order the body of Mrs. Bullard was exhumed on 18 March 1975 and taken to the Office of the Chief Medical Examiner in Chapel Hill. Dr. William Frank Hamilton testified that he performed toxicological screenings upon samples of hair, muscle tissue and skin which had been taken from the body; that the hair sample revealed an arsenic concentration of .5 milligrams percent; that the muscle tissue had an arsenic level of .3 milligrams percent; that the skin sample had an arsenic level of .1 milligrams percent; and that in his opinion, Mrs. Bullard's death was caused by arsenic poisoning.

Although defendant did not admit any involvement in the death of her husband, Jennings L. Barfield, his body was exhumed pursuant to a court order on 31 May 1972. It was taken to the Office of the Chief Medical Examiner in Chapel Hill where an autopsy was performed. Toxicological screenings indicated that varying levels of arsenic were present in his body tissue.

Dr. Neil A. Worden testified that he treated Mr. Barfield when he was brought to the emergency room of the Cape Fear Valley Hospital in Fayetteville on 22 March 1971. At that time Mr. Barfield complained of nausea, vomiting, diarrhea and aching throughout his body. Mr. Barfield had

been brought to the emergency room for the first time at about 11:00 p. m. on 21 March 1971. At that time he was treated and released. However, he returned to the hospital at 5:00 the next morning at which time he was given intravenous fluids. By the time that Dr. Werden first saw him at about 8:00 a. m., Mr. Barfield was in shock; his blood pressure was low; his pulse was rapid; and his complexion was ashen. Dehydrated and gasping for air, Mr. Barfield appeared to Dr. Werden to be in great pain. Dr. Hamilton testified that the cause of Mr. Barfield's death was arsenic poisoning.

At the close of the state's evidence, defendant made a motion to dismiss. Upon the court's denial of the motion, she presented evidence which tended to show:

During the month of January 1978 defendant was under the care of five doctors none of whom knew she was under the care of the others. She had been seeing the doctors for some time and had obtained prescriptions for a number of drugs from them. Among the drugs she was taking at that time were: Elavil, Sinequan, Tranxene, Tylenol III, and Valium. She had a history of drug abuse and had been admitted to the hospital at least four times for overdoses.

Two doctors, Dr. Arthur E. Douglas and Dr. Bob Rollins, testified that it was their opinion that while defendant was prone to abuse prescription drugs she was sane at the time of the death of Stewart Taylor, as well as at the time of trial. Though he declined to render an opinion as to defendant's sanity, Dr. Anthony Saint, testifying by way of a deposition, agreed with the observations of Dr. Douglas and Dr. Rollins that there was no evidence that defendant suffered from any mental illness. Dr. Saint also agreed with the conclusions of the other doctors that defendant was competent to stand trial and participate in her own defense. All of the doctors agreed that defendant knew the difference between right and wrong. Dr. Douglas and Dr. Rollins concluded that defendant had a passive-dependent type of personality whereas Dr. Saint felt that she had a passive-aggressive personality.

Defendant took the stand on her own behalf. Her testimony was generally consistent with the statements she gave to Officers Lovette and Parnell. She admitted to poisoning Stewart Taylor, John Henry Lee, Dolly Taylor Edwards and her mother, Lillie McMillan Bullard. She had no recollection of what happened with regard to the death of her husband, Jennings L. Barfield. She stated that on 31 January 1978, the day she allegedly administered poison to Taylor, she took a quantity of medication at about 11:00 a. m.: three Sinequans, three Elavils, six Valiums, and four Tranxenes. She further stated that she was taking her medication in double doses in late January and early February 1978.

Defendant admitted that she had poisoned Dolly Taylor Edwards, but said that she could not offer any explanation as to why. She gave her reasons for poisoning Stewart Taylor, John Henry Lee and Lillie McMillan Bullard. As to Taylor, she stated that she had forged a check on his account. Fearing that Taylor would "turn her in" for forgery, she gave him Terro Ant Killer thinking it would make him sick. In regard to Lee, though her recollection was vague, she recalled that she had written a check on his account because she needed the money to pay for drugs, the same reason that she wrote checks on Taylor's account. In the case of her mother, defendant stated that she had forged the note at Commercial Credit Company because she needed the money to pay for drugs and visits to her various doctors.

The jury returned a verdict finding defendant guilty of the first-degree murder of Taylor.

The court then proceeded to conduct the sentencing phase of the trial before the same jury pursuant to G.S. 15A-2000 et seq. to determine if defendant's sentence on the murder conviction would be death or life imprisonment. The state offered no additional evidence. Defendant presented evidence which tended to show that prior to the death of her first husband in 1969 she did not abuse prescription drugs; following

his death, however, she underwent a change in attitude and demeanor which was reflected in a pattern of drug abuse.

Issues as to punishment were submitted to and answered by the jury as follows:

1. Do you find beyond a reasonable doubt that the following aggravating circumstance(s) exist?

a. The murder of Stewart Taylor was committed for pecuniary gain.
ANSWER: *YES*

b. The murder of Stewart Taylor was committed to hinder the enforcement of the law.
ANSWER: *YES*

c. The murder was especially heinous, atrocious or cruel.
ANSWER: *YES*

2. Do you find that one or more of the following mitigating circumstances exist?

a. The murder was committed while the defendant was under the influence of mental or emotional disturbance.
ANSWER: *NO*

b. The capacity of the defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was impaired.
ANSWER: *NO*

c. Other circumstances which the jury deems to have mitigating value:

3. Do you find beyond a reasonable doubt that the mitigating circumstance(s) (is) (are) insufficient to outweigh the aggravating circumstance(s)?
ANSWER: *YES*

4. Do you find beyond a reasonable doubt that the aggravating circumstance(s) (is) (are) sufficiently substantial to call for the death penalty?
ANSWER: *YES*

The jury recommended that a sentence of death be imposed upon the defendant. Pursuant thereto the court imposed the death sentence.

Atty. Gen. Rufus L. Edmisten by Asst. Atty. Gen. Richard L. Griffin, Raleigh, for the state.

Robert D. Jacobson, Lumberton, for defendant-appellant.

BRITT, Justice.

We find no prejudicial error in either phase of defendant's trial and conclude that the verdicts and judgment should not be disturbed. We will discuss the errors assigned under each phase.

PHASE I—GUILT DETERMINATION

By her first assignment of error defendant contends that the trial court erred in denying her motion for the appointment of additional counsel. There is no merit in this assignment.

When it had been determined that defendant was indigent, Attorney Robert D. Jacobson of the Robeson County Bar was appointed to serve as her counsel. At an early stage of the proceedings against defendant, Mr. Jacobson learned that the defendant was suspected of having committed at least four other murders by poisoning in addition to the one that she then stood accused of. On 15 March 1978 a motion was made that additional counsel be appointed to assist Mr. Jacobson in representing defendant. District Judge Charles G. McLean denied the motion after conducting a hearing.

[1-3] It is the responsibility of the state to provide an indigent defendant with counsel and the other necessary expenses of representation. G.S. 7A-450. However, defendant's right to court-appointed counsel does not include the right to require the court to appoint more than one lawyer unless there is a clear showing that the first appointed counsel is not adequately representing the interests of the accused. *People v. Marsden*, 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44 (1970). In making that determination the legitimate interest that the state has in securing the best utilization of its legal resources must be considered along with the interests of the defendant. *Cf.*

State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977) (appointment of two attorneys for each defendant in a murder trial criticized).

[4] While there may be situations in which the right to the effective assistance of counsel can be safeguarded only by the appointment of additional counsel, such a situation is not present in this case. Though defendant was suspected of having poisoned four persons other than Stewart Taylor, no charges were brought in connection with those deaths. While it is true that the state introduced evidence at trial which tended to show that defendant was involved in those deaths, the burden imposed upon defense counsel was not excessive. It is not unusual for a defendant to be tried for a number of offenses in one trial. Nor is it uncommon for evidence of other acts of misconduct to be introduced in a criminal trial to show motive, intent, or a scheme or plan. An attorney who is representing a criminal defendant must be prepared to deal with such evidence as it arises in the course of the trial. Though Mr. Jacobson carried a great burden in representing the defendant in a capital case, we do not find it to have been so disproportionate to that borne in the usual course of criminal defense work so as to have required the court to have appointed another attorney to provide assistance. We would add, parenthetically, that Judge McLean's order reflects favorably upon Mr. Jacobson's professional background and experience, indicating that he was competent to represent the best interests of the defendant. It is our opinion that Mr. Jacobson gave defendant high quality representation.

By her second assignment of error, defendant contends that the court improperly denied her motion for a change of venue to the western part of the state. In her third assignment of error, she contends that the court erred in moving the case from Scotland County to Bladen County for trial. These assignments are interrelated and will be dealt with accordingly. Neither is meritorious.

On 19 April 1978 defendant moved for a change of venue to the western part of the state pursuant to G.S. 15A-957. She contended that she would be unable to secure a fair and impartial trial in Robeson County because of extensive pretrial publicity. Following a hearing on the motion, Judge Hobgood ordered that the case be removed to Scotland County.

On 1 November 1978 the district attorney moved that the case be transferred from Scotland County to Bladen County for the reasons that there were only four weeks of criminal superior court scheduled for Scotland County during 1978, defendant was scheduled to be tried during the 27 November 1978 Session of Scotland Superior Court, and there were approximately twenty persons confined to jail who were awaiting trial at that session. Though defendant objected to the change of venue, stating that she was satisfied with Scotland County, Judge Hobgood granted the motion and ordered that the case be removed to Bladen County for trial.

[5, 6] G.S. 15A-957 provides that if the court determines, upon the motion of the defendant that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either transfer the proceeding or order a special venire from another county. The *statutory power* of the court to change the venue of a trial is limited to transferring the case to an adjoining county in the judicial district or to another county in an adjoining judicial district. G.S. 15A-957. Notwithstanding this apparent statutory limitation upon the power of a court to order a change of venue, a court of general jurisdiction, of which our superior court is one, *Bryant v. Dougherty*, 267 N.C. 565, 148 S.E.2d 548 (1966), has the inherent authority to order a change of venue in the interests of justice. *English v. Brigman*, 227 N.C. 280, 41 S.E.2d 732 (1947). In either case, a motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *State v. Allard*, 280 N.C. 372, 223 S.E.2d 222, death sentence

vacated, 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed.2d 69 (1976); *State v. Mitchell*, 283 N.C. 462, 196 S.E.2d 736 (1973); *State v. Blackmon*, 280 N.C. 42, 185 S.E.2d 133 (1971).

[7, 8] There has been no showing of an abuse of discretion in this instance. While it is true that there is evidence in the record which tends to show that a radio station in Lumberton as well as newspapers in Robeson County and surrounding counties gave coverage to the pending trial, there is nothing which suggests that the coverage was anything more than general in nature and likely to be found in any jurisdiction to which the trial might be removed. *See State v. Alford, supra; see also* Annot., 33 A.L.R.3d 17 (1970). Furthermore, Judge Hobgood, in view of the Speedy Trial Act, G.S. 15A-701 et seq., had to consider the rights of the twenty other defendants awaiting trial in Scotland County as well as the rights of the defendant in this case.

In her fourth assignment of error, defendant asserts that the trial court erred in refusing to grant her motion for a continuance. This assignment has no merit.

On 1 November 1978 the court was advised that one of defendant's witnesses, Dr. Anthony Sainz, was hospitalized and not expected to be released soon thereafter. Defendant moved for a continuance. Following a hearing, Judge McKinnon denied the motion but provided that defendant could renew her motion upon obtaining a written statement by a physician that Dr. Sainz would not be able to testify or give a deposition before or during the week of 27 November 1978, the week defendant's case was scheduled for trial. On 27 November 1978, with Dr. Sainz still hospitalized, defendant renewed her motion for a continuance. The motion was denied. On 30 November 1978 the deposition of Dr. Sainz was taken in his hospital room at the Cape Fear Valley Hospital. Defendant's attorney, the district attorney, the presiding judge, and a court reporter were present at the time the deposition was taken.

[9, 10] A motion for a continuance is ordinarily addressed to the sound discretion of the court and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Rigsbee*, 285 N.C. 708, 208 S.E.2d 656 (1974); *State v. Cox*, 281 N.C. 275, 188 S.E.2d 356 (1972); *State v. Stepney*, 280 N.C. 306, 185 S.E.2d 844 (1972). However, when the motion for continuance is based upon a right which is guaranteed by the State or Federal Constitutions, the question is not one of discretion but one of law and is reviewable upon appeal. *State v. Smathers*, 287 N.C. 226, 214 S.E.2d 112 (1975); *State v. Robinson*, 283 N.C. 71, 194 S.E.2d 811 (1973).

[11] Defendant argues that the standards enunciated in *Smathers* and *Robinson* ought to control the disposition of her case. We disagree. Contrary to the allegations of defendant, this is not a case where a continuance could properly have been based upon her Sixth Amendment right to have compulsory process issue to secure the presence of witnesses in her behalf. The facts of *State v. Rigsbee, supra*, are similar to the facts of this case. In *Rigsbee* this court applied the abuse of discretion standard of review to uphold the trial judge's denial of a motion for a continuance when a confidential informant under subpoena failed to appear at trial. In *Rigsbee*, as well as in the present case, the motion for a continuance was predicated upon the absence of a witness sought by the defendant. The present case differs from *Rigsbee* in that the testimony of Dr. Sainz was obtained and presented before the jury by way of deposition. While it is true that the demeanor and appearance of a witness upon the stand before the jury may prove to be beneficial to the party who offers the witness' testimony, a deposition is an accepted means of perpetuating and presenting the testimony of an unavailable witness. G.S. § 8-74. One of the specific grounds upon which a deposition may be taken and offered into evidence at a criminal trial is such an infirmity or physical incapacity on the part of a witness that the defendant is unable to procure his attendance at trial. Such were the facts in the present case.

Dr. Sainz was then suffering from tuberculosis and was not expected to be able to return to his office before the first of the year (1979). Therefore, we conclude that the court did not abuse its discretion in denying defendant's motion for a continuance.[1]

In her sixth assignment of error, defendant contends that the trial court erred in refusing to grant her motion for an individual *voir dire* of each juror and sequestration of the jurors during *voir dire*. This assignment has no merit.

A pretrial motion for an individual *voir dire* of each juror and for sequestration of the jurors during *voir dire* was made by defendant on 25 April 1978. The motion was denied in chambers immediately before the trial began. The court directed that twelve prospective jurors be seated in the jury box during *voir dire*. All other prospective jurors were excluded from the courtroom until such time as they were seated in the jury box to replace a venireman who had been excused.

[12, 13] A motion for an individual *voir dire* is addressed to the sound discretion of the court and will not be disturbed except for an abuse of discretion. *State v. Thomas*, 294 N.C. 105, 240 S.E.2d 426 (1977); *State v. Young*, 287 N.C. 377, 214 S.E.2d 763 (1975), *death sentence vacated* 428 U.S. 902, 96 S.Ct. 3207, 49 L.Ed.2d 1208 (1976). Defendant argues that a collective *voir dire* enables the jurors to digest the answers of each other and consider answers that would result in their exclusion from the panel. A domino effect is then alleged to take place, whereby juror after juror professes an aversion to the death penalty in order to be relieved of jury duty. At best, defendant's argument is speculative. There is no showing that any such thing occurred during defendant's trial. We find no basis upon which to disturb the exercise of the trial court's discretion.

In her seventh assignment of error, defendant contends that the trial court erred in allowing the state to challenge for cause certain jurors who voiced general objections to capital punishment or who expressed conscientious or religious scruples against the death penalty. Defendant asserts that an examination of the record reveals that several of the prospective jurors who were challenged for cause by the district attorney and excused by the court were merely ambivalent toward the death penalty. This assignment is without merit.

[14] "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776, 784–85, *rehearing denied*, 393 U.S. 896, 89 S.Ct. 67, 21 L.Ed.2d 176 (1968). *See also* Cook, Constitutional Rights of the Accused: Trial Rights § 117 (1974); 3 Wharton's Criminal Procedure § 461 (12th ed. 1975). Unless a venireman is irrevocably committed before the trial begins to vote against the death penalty regardless of what the facts and circumstances might prove to be from the evidence adduced at trial, he cannot be excluded from the panel. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). If a venireman who is not so committed is improperly excluded, any subsequently imposed death sentence cannot stand. *Davis v. Georgia*, *supra*.

[15] A prospective juror is properly excused for cause when his answers on *voir dire* concerning his attitudes toward the death penalty, although equivocal, show when considered contextually that regardless of the evidence he would not vote to convict the defendant if conviction meant the imposition of the death penalty. *State v. Barnard*, 293 N.C. 321, 213 S.E.2d 327 (1975); *State v. Simmons*, 293 N.C. 611, 213 S.E.2d 280 (1975); *State v. Avery*, 293 N.C.

1. When this case was argued, defendant's counsel advised the court that Dr. Sainz died sometime after his deposition was taken.

459, 212 S.E.2d 142 (1975), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3209, 49 L.Ed.2d 1209 (1976). *See generally* Annot., 39 A.L.R.3d 550 (1971).

[16] While it is true that taken by themselves, the answers that some of the jurors called to serve in defendant's trial seem to be equivocal or contradictory, taken as a whole, the examination indicates opposition to the death penalty so strong that they could not vote to impose it regardless of the evidence. The words of Justice (now Chief Justice) Branch from *State v. Bernard* are instructive on this point. In *Bernard*, the following exchange took place on *voir dire*:

> Q. Do you have any religious or moral scruples or beliefs against capital punishment?
>
> A. Well, I don't believe in the death penalty, no.
>
> Q. Sir?
>
> A. I don't believe in the death penalty, no.
>
> Q. It would be impossible regardless of the evidence for us to put enough evidence in there to satisfy you to bring in a verdict of guilty if that meant the imposition of the Death Penalty, is that right?

In reference to this exchange, Justice Branch commented, "An unequivocal answer to the final question asked by the solicitor would have determined prospective juror Gantt's competence to serve on the panel *so far as the Witherspoon rule might apply.*" (Emphasis added.) Our examination of the record in the case now before us would seem to indicate that the benchmark laid down in *Bernard* was met. In her brief, defendant mentions the *voir dire* of three jurors in particular: Mr. Dent, Miss Grimes, and Miss McKoy. After each was challenged for cause by the district attorney, the presiding judge proceeded to conduct an examination of their attitudes toward the death penalty. In response to questioning by the court, each of the named jurors indicated that no matter what aggravating circumstances were established by the evidence, he or she could not vote to impose a death sentence. These unequivocal responses satisfy the demands of *Bernard*. There was no error.

Defendant assigns as error the admission of evidence concerning the deaths of John Henry Lee, Dolly Taylor Edwards, Lillie McMillian Bullard and Jennings Barfield. The evidence tended to show that defendant was responsible not only for the poisoning death of Stewart Taylor for which she was charged but also for the poisoning deaths of the other four individuals. The evidence further tended to show that she had committed additional acts of forgery and uttering. This assignment has no merit.

[17] Evidence that a defendant has committed other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows guilt of another crime. *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Stegmann*, 286 N.C. 633, 213 S.E.2d 262 (1975), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed.2d 1206 (1976); 1 Stansbury's North Carolina Evidence § 91 (Brandis Rev.1973).

[18, 19] The rule is predicated upon the law's desire to preserve for the accused in an unencumbered state the presumption of innocence which is at the heart of every criminal prosecution. *See State v. Christopher*, 258 N.C. 249, 128 S.E.2d 697 (1962). Furthermore, the rule operates to protect the defendant from the surprise introduction of extraneous matters which are unduly prejudicial because their probative value is outweighed by the danger that the issues before the jury will be confused and the trial's length will be prolonged. *See generally* McCormick on Evidence § 190 (2d ed. 1972); 1 Wharton's Criminal Evidence § 240 (13th ed. 1972). Notwithstanding these important considerations of public policy, there are a number of instances where the probative value of such evidence

outweighs the specter of unfair prejudice to the defendant. *Cf. State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954) ("The general rule excluding evidence of the commission of other offenses by the accused is subject to certain well recognized exceptions, which are said to be founded on as sound reasons as the rule itself.") We perceive at least four grounds upon which evidence tending to show that defendant poisoned four individuals other than Stewart Taylor would be relevant.

[20] It is clear that evidence that a defendant committed other offenses is relevant to establish a defendant's knowledge of a given set of circumstances when such a set of circumstances is logically related not only to the crime the defendant is on trial for but also is logically related to the extraneous offense. *State v. Walker*, 251 N.C. 465, 112 S.E.2d 61, *cert. denied*, 364 U.S. 832, 81 S.Ct. 45, 5 L.Ed.2d 58 (1960); *State v. McClain*, *supra*; *State v. Smoak*, 213 N.C. 79, 195 S.E. 72 (1938); McCormick on Evidence § 190 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev. 1973); 2 Wigmore on Evidence § 303 (1940). The *Smoak* case is particularly illustrative of this point.

In *Smoak*, the defendant was on trial for the first-degree murder of his daughter, Annie Thelma Smoak. Though she died on 1 December 1936, Annie was taken to a hospital on Thanksgiving Day, 1936, and treated for symptoms of strychnine poisoning. An autopsy indicated that the cause of her death was strychnine poisoning. At trial the state was permitted to introduce evidence tending to show that the defendant's second wife had died from strychnine poisoning. This court upheld the admission of the evidence, offering a number of grounds upon which it was relevant. One of the grounds of relevancy noted in the opinion was showing the defendant's knowledge of the effect of a particular poison, citing with approval the leading cases of *Goersen v. Commonwealth*, 99 Pa. 388 (1882), and *Zoldoske v. State*, 82 Wis. 580, 52 N.W. 778 (1892). It is appropriate to apply the principle of *Smoak* to the facts of the present case. When she took the stand in her own defense, the defendant testified:

> On Tuesday, after the weekend, I had to come to Lumberton to Dr. Baker's office to have a dressing changed and on the way back home, we stopped at Eckerd's Drug Store to get some hair spray and there is where I purchased the Terro [Ant Killer]. *I purchased it because I thought it would make him [Stewart Taylor] sick. I did intend to give it to him.* (Emphasis added.)

Earlier, in the presentation of the state's case-in-chief, the statement which the defendant had given to Officers Parnell and Lovette was introduced into evidence. In her statement, the defendant confessed:

> I had given poison to people before and they died. The label (on the bottle of poison) read, "May be fatal if swallowed."

[21-23] The defendant's testimony from the stand is at odds with the clear implication of the statement that she gave to the deputies, i. e., that she knew the fatal properties of the insecticide. The evidence which relates to the deaths of the other four individuals is, therefore, admissible to show that the defendant knew the probable consequences of her actions when she administered the poison to Stewart Taylor. Its relevancy is made more striking when one notes that defendant entered a plea of not guilty by reason of insanity in addition to a general plea of not guilty. The test of insanity as a defense to a criminal charge is whether the accused, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act, or, if he does know this, was by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such act. *State v. Jones*, 293 N.C. 413, 238 S.E.2d 482 (1977); *see also*, W. LaFave & A. Scott, Handbook on Criminal Law § 37 (1972); Comment, The Insanity Defense in North Carolina, 14 Wake Forest L.Rev. 1187 (1978). For a defendant to know the nature and quality of his act, he must have understood the physical nature and conse-

quences of the act. *State v. Terry*, 173 N.C. 761, 92 S.E. 154 (1917); *State v. Spivey*, 122 N.C. 989, 43 S.E. 475 (1903); *see also*, LaFave & Scott, *supra*, § 37; Comment, The Insanity Defense in North Carolina, *supra* at 1166–1168. Since the defendant tendered a plea of not guilty by reason of insanity, it was in issue whether or not the defendant knew the physical nature and consequences of her actions. Accordingly, the *Smoak* holding is buttressed further.

[24–27] Evidence that defendant poisoned four individuals in addition to Stewart Taylor was relevant for the purpose of showing her intent. Evidence of other offenses is properly admitted whenever it is necessary to prove that a defendant had a specific intent or that a particular act was done intentionally rather than accidentally. *State v. Jenerett*, 281 N.C. 81, 187 S.E.2d 735 (1972); *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652 (1969); McCormick on Evidence § 190 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev. 1973). Though homicide which is committed by use of poison does not differ in its substantive elements from homicide committed by other means, the deliberative features which usually attend the use of poison have historically caused the courts to receive evidence of its prior uses in order to show intent. 2 Wigmore on Evidence § 302, n. 11 (1940). Such evidence is clearly relevant in a prosecution for first-degree murder in that the state must prove a specific intent to kill if it is to win a conviction. *State v. Wilson*, 280 N.C. 674, 187 S.E.2d 22 (1972). Defendant was tried for first-degree murder. Evidence that she had previously administered poison to others was competent to show specific intent on her part in that she had a pattern of administering poison to persons, knowing full well the probable consequences of her actions.

[28, 29] Evidence of other offenses is relevant to establish a defendant's motive in engaging in criminal conduct. *State v. Poole*, 280 N.C. 47, 220 S.E.2d 330 (1975); *State v. Arnold*, 284 N.C. 41, 199 S.E.2d 423 (1973); *State v. Smoak*, *supra*; McCormick on Evidence § 190 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev.1973). Again, the facts of the *Smoak* case are pertinent in explaining this point. In *Smoak*, the state was allowed to introduce evidence that tended to show a pattern of similar deaths which were followed by the defendant filing proof of death and collecting the proceeds of life insurance policies he had procured on the lives of the decedents. Such evidence was deemed competent to show the defendant's motive in administering poison to his daughter, for whose death he was being tried. These facts are analogous to the facts of the case at bar. The state presented evidence which tended to show a pattern of behavior on the part of defendant in perpetrating a repeated number of forgeries which were accompanied by the discovery of the forgery or of a fear on the part of defendant that they would be discovered. The state's evidence tended to show that defendant poisoned the individuals, with the exception of Dolly Taylor Edwards, only after the forgeries were discovered or when she became fearful of discovery. The evidence tends, therefore, to establish a motive for the crimes.

[30] Furthermore, the evidence tends to establish the existence of a continuing plan or scheme on the part of defendant. The state established that defendant used the proceeds of her forgeries to support her drug addiction. The state further showed that in each instance, with the exception of Mrs. Edwards, the deaths were preceded by conduct which resulted in pecuniary gain to the defendant. The deaths were, therefore, the product of the same motivation to act on the part of the defendant and reflected an ongoing design on her part to assure the support of her drug habit.

[31–34] Evidence of other offenses is admissible if it tends to show the existence of a plan or design to commit the offense charged, or to accomplish a goal of which the offense charged is a part or toward which it is a step. *State v. Greene*, 284 N.C. 418, 201 S.E.2d 862 (1973); *State v. Hunter*, 280 N.C. 556, 227 S.E.2d 535 (1976), *cert. denied*, 429 U.S. 1093, 97 S.Ct. 1106, 51

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L.Ed.2d 539 (1977); *State v. Grace*, 287 N.C. 243, 213 S.E.2d 717 (1975); McCormick on Evidence § 190 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev. 1973). When it is offered for this purpose, such evidence ought to be examined with special care to see that it is really relevant to the establishment of a design or plan rather than merely showing character or a disposition to commit the offense charged. 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev.1973). A mere similarity in results is not a sufficient basis upon which to receive evidence of other offenses. Instead, there must be such a concurrence of common features that the assorted offenses are naturally explained as being caused by a general plan. 2 Wigmore on Evidence § 304 (3d ed. 1940). This requirement is grounded in the proposition which underlies much of the law of criminal evidence: The prosecution ought not be able to introduce evidence of other criminal offenses of the defendant unless the evidence is relevant for some other purpose than to show that the defendant is guilty because he has a criminal disposition. See McCormick on Evidence § 190 at p. 447 (2d ed. 1972).

A careful examination of the facts of the present case reveals the concurrence of common features that Dean Wigmore refers to in his treatise. This concurrence is found in the showing that prior to the death of each victim, defendant had lived or worked in his or her home; and that the means of inflicting death was identical in each instance. In the cases of Stewart Taylor, John Henry Lee and Lillie McMillan Bullard, there was evidence that the defendant had executed a forgery that resulted in pecuniary gain to her before their deaths. The forgeries which were committed against Taylor and Lee were discovered. Defendant became afraid that the forgery that she had committed against her mother would be discovered. It was only then, in each instance, that she obtained poison and administered it to her intended victim.

[35, 36] In light of the foregoing, it is clear that the evidence was properly admitted under the rules of evidence as they have been accepted and interpreted in North Carolina and by the weight of the leading authorities in the field. It therefore follows that since the evidence of the other deaths was properly admitted as components of the state's case, it was not error for the district attorney to refer to them in his argument before the jury. While it is true that an attorney may not travel outside of the record and inject into his argument facts which are not in evidence, *Jenkins v. Harvey C. Hines*, 264 N.C. 83, 141 S.E.2d 1 (1965), there is no prohibition against an attorney making reference in his argument to evidence which has been properly admitted. Nor was there error in the instructions the court gave the jury as to how they might consider the evidence concerning the other deaths. The court instructed the jury that the evidence was received and was to be considered by them only for the purpose of showing that the defendant had the intent required for first-degree murder, that she knew that the administration of poison would cause the death of Stewart Taylor, and that there existed in her mind a plan or scheme or design on her part to kill Stewart Taylor. Judge McKinnon's charge properly stated the applicable law as it is enunciated above, reminding them that "evidence of guilt of such charges would not be evidence of guilt of the present charge. . . ."

Defendant assigns as error the admission of certain evidence for the reason that its sole purpose was to inflame the minds of the jurors against her. She further contends that throughout the trial, the district attorney presented the case for the state in such a way that he was guilty of prosecutorial misconduct. We disagree with these contentions.

[37–41] Every criminal defendant is entitled to have a fair trial which is conducted before an impartial judge and unprejudiced jury in an atmosphere of calm deliberation. *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978); *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975); *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971). The obligation to take steps to assure a defendant's right to a

fair trial rests upon the shoulders of both the presiding judge and the district attorney. *State v. Britt, supra*; *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975); *State v. Phillips*, 240 N.C. 516, 82 S.E.2d 762 (1954). However, it should be noted that the obligation of the district attorney to conduct himself in such a manner as to assure the right to a fair trial does in no way lessen his obligation to the state to prosecute criminal charges to the best of his abilities on the basis of the evidence that he is able to bring before the jury. *See State v. Britt, supra*; *State v. Stegmann, supra*; *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972). Accordingly, counsel is given wide latitude in the argument of hotly contested trials, subject to the exercise of the sound discretion of the presiding judge. *State v. Monk, supra*; *State v. Westbrook, supra*; *State v. Seipel*, 252 N.C. 335, 113 S.E.2d 432 (1960). The district attorney has the right and the duty to cross-examine vigorously a defendant who takes the stand in his own defense, *State v. Ross*, 275 N.C. 550, 169 S.E.2d 875 (1969), *cert. denied*, 397 U.S. 1050, 90 S.Ct. 1387, 25 L.Ed.2d 665 (1970); *State v. Wentz*, 176 N.C. 745, 97 S.E. 420 (1920).

[42–44] The district attorney's performance of his duties as public prosecutor is tempered by his obligation to the defendant to assure that he is afforded his right to a fair trial. Therefore, he may not, by argument or by cross-examination, place before the jury incompetent and prejudicial matters. *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed.2d 1205 (1976); *State v. Dockery*, 238 N.C. 222, 77 S.E.2d 664 (1953). This rule is violated by asking questions which are phrased impertinently or insultingly so as to badger or humiliate a witness. *State v. Daye*, 281 N.C. 592, 189 S.E.2d 481 (1972); *State v. Wyatt*, 254 N.C. 220, 118 S.E.2d 420 (1961). Nor may he place before the jury evidence whose only effect is to excite prejudice or sympathy. *State v. Britt, supra*; *State v. Lynch, supra*; *State v. Rinaldi*, 264 N.C. 701, 142 S.E.2d 604 (1965). The test that is to be applied is whether the evidence tends to shed any light upon the subject matter of the inquiry or has as its only effect the exciting of prejudice or sympathy. *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978).

In his brief, defendant refers to a number of instances of alleged misconduct on the part of the district attorney in the prosecution of this case. While we do not perceive a need to discuss these allegations in great detail, we will proceed to discuss each one briefly in light of the foregoing principles of law.

[45–49] John D. McPherson, a member of the St. Pauls Rescue Squad, as well as an employee of the Robeson County Ambulance Service, testified during the state's case-in-chief as to the condition of Stewart Taylor when he was taken back to the hospital on 3 February 1978. McPherson had the opportunity to observe the decedent not only at his home but also during the trip to the hospital as well as at the emergency room of Southeastern General Hospital. McPherson testified that he and two ambulance attendants had to restrain Taylor so that the emergency room personnel could administer shots and intravenous fluids. It was his testimony that Taylor's hands, arms, and legs had to be held down in order to keep him in the bed in the emergency room. McPherson testified that he worked to restrain Taylor until he threw back his head and screamed. At that time, McPherson ran from the room and summoned a nurse after which a doctor began to administer a tracheotomy. The following exchange then took place on direct examination:

Q. How loud was the scream that you say he uttered?

A. Fairly loud.

Q. Can you duplicate it here?

MR. JACOBSON: Object.

COURT: Overruled, if he can.

A. Well, he just threw back his head and said (witness made screaming noise).

MR. JACOBSON: Object. Move to strike.

COURT: Overruled, motion denied.

The conduct of the witness amounts, in substance, to a courtroom demonstration. The conditions under which demonstrations are performed must correspond in all essential particulars with those existing at the time and place of the event. *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963). The circumstances need not be identical, but a reasonable or substantial similarity is sufficient. *State v. Phillips*, 228 N.C. 595, 46 S.E.2d 720 (1948). So long as that touchstone is met, the weight that is to be given to the demonstration is for the jury to decide. *State v. Brown*, 280 N.C. 588, 187 S.E.2d 85 (1972). The degree of similarity is a question upon which the trial judge must exercise his discretion in evaluating. *State v. Carter*, 282 N.C. 297, 192 S.E.2d 279 (1972). We perceive no abuse of discretion on the part of the trial judge. The witness was present at the time of the incident to which he was testifying. The demonstration did serve to complete his account of the condition of Taylor before he died and the pain he was experiencing. Any demonstration in some sense and to some degree breaches the customary decorum of the courtroom. It is only with great caution that this decorum should be breached. Such caution is allowed for when the demonstration is necessary in order to allow the trier of fact to fully understand the facts and circumstances of the case that is before it.

[50] Dr. John D. Larson testified for the state concerning the condition Stewart Taylor was in when he was taken back to the hospital on 3 February 1978. During redirect examination by the district attorney, the following exchange took place.

A. . . . I have indicated that I have never treated an arsenic case.

MR. BRITT: Is that to say arsenic is more or less exotic or not?

MR. JACOBSON: Object.

COURT: Sustained.

The question was improper because it called for an opinion on the part of a witness who had not been properly qualified and offered as an expert competent to state an opinion. *See generally* 1 Stansbury's North Carolina Evidence §§ 133–134 (Brandis Rev.1973). However, the witness did not have an opportunity to answer the propounded question in that the timely objection of defense counsel was sustained by the court. No evidence was elicited by the district attorney in response to the question. We find no prejudice.

[51] Alice Storms, Stewart Taylor's daughter, testified on behalf of the state. During her direct examination, the district attorney pursued a line of questioning which tended to show that Taylor was accustomed to carrying large sums of money with him in his wallet. Mrs. Storms testified that after her father died at the hospital she received his personal property, including his wallet. When defendant gave Mrs. Storms Taylor's wallet, it contained two dollars. Defendant contends that the line of questioning was irrelevant. We do not find that to be the case. The evidence was relevant on the issue of the defendant's motive in committing the crime. It was competent because the witness was testifying as to facts within her personal knowledge.

[52–54] Ellen Mintz, Jennings Barfield's daughter, testified on behalf of the state. In a line of questioning, the district attorney tried to elicit information concerning the nature and extent of her father's estate. He also sought to place before the jury whether the defendant received any of the proceeds of the estate or of any insurance. Repeatedly, objections made by defense counsel were sustained by the presiding judge when the witness would attempt to testify as to what she had been told what defendant had received from the estate. At other times she attempted to testify as to her assumptions as to what defendant had received from the estate. The objections were properly sustained. There is nothing in the law of evidence which serves to prevent an attorney from persisting in

his efforts to obtain competent evidence from a witness. There is nothing in the record which indicates that the district attorney was badgering his own witness. Nor is there anything in the record which suggests that the questions were not asked in good faith.

[55] When defendant took the stand on her own behalf, the district attorney asked her during cross-examination if she had poisoned Record Lee, the wife of John Henry Lee. Defendant denied having given any poison to Mrs. Lee. It was only after defendant answered the question that an objection was made. The district attorney did not, as defendant contends, accuse defendant of poisoning Record Lee. When defendant denied that she had done so, the district attorney elected not to pursue the matter. There was no prejudice.

[56] After defendant admitted on the stand to having poisoned Dolly Taylor Edwards, the district attorney posed the following question to her:

> Q. And the reason you poisoned her to death was because she was just a cantankerous old lady to live with, wasn't she?

Defendant's attorney objected and the court sustained the objection as to form. Assuming the question was improper as a breach of courtroom decorum, in light of the overall conduct of the trial and the evidence otherwise presented against defendant, we perceive no prejudice.

Defendant contends that the trial court erred in receiving several items into evidence without first requiring that an adequate foundation be laid. There is no merit in this contention.

[57–60] In the statement which she gave to Officers Lovette and Parnell, defendant admitted poisoning Dolly Taylor Edwards saying:

> I went to D. D. McCall's store and bought a bottle of poison. It was in a plastic bottle. The label read "Could be fatal if swallowed." I came back home and put some of it in her coffee and cereal. . . . I knew what I gave her caused her death. I threw the bottle in the field back of the house.

During his investigation, Officer Lovette went to the home of Mrs. Edwards, went around to the back of the house and to the spot where defendant said she had thrown the bottle. There, he found an empty bottle which bore the label of "Singletary's Rat Poison." Officer Lovette testified that he initialed the bottom of the bottle when he recovered it and that he had kept the bottle in his sole possession from the time he recovered it to the time of trial with no one else having access to it. Defendant argues that the bottle was inadmissible on grounds of remoteness in that more than a year had passed from the time she allegedly threw it in the field and the time it was recovered.

Real evidence is that evidence which is provided by producing for inspection at trial a particular item rather than having witnesses describe it. 1 Stansbury's North Carolina Evidence § 117 (Brandis Rev.1973). A two-pronged foundation must be laid before such evidence is properly received in evidence. First, the item which is offered must be identified as being the same object involved in the incident at issue. *State v. Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971). Officer Lovette testified that he recognized state's Exhibit Number Ten as being the bottle he found in the field behind Mrs. Edwards' house. Second, it must also be shown that since the incident in which it was involved, the object has undergone no material change in its condition. *State v. Harbison, supra; Hunt v. Wooten*, 238 N.C. 42, 76 S.E.2d 326 (1953). Officer Lovette testified that the label was still on the bottle and was recognizable when he recovered it in the field. He further testified that it had been in his sole custody until the time of trial. The trial judge possesses and must exercise sound discretion in determining the standard of certainty that is required to show that the object which is offered is the same object involved in the incident in issue and that the object is in an unchanged condition. *State v. Harbison, supra.* Abuse of discretion is not shown here.

[61, 62] Nor is there evidence of an abuse of discretion on the part of the presiding judge in receiving into evidence the various checks that defendant is alleged to have forged upon the accounts of Stewart Taylor and John Henry Lee. During her direct examination, Alice Storms identified six checks bearing her initials for identification as being checks bearing the signature of her father, Stewart Taylor. She was then shown three other checks which she identified as not bearing the authentic signature of her father. A lay person is competent to state an opinion as to the handwriting of an individual provided that the witness is familiar with the handwriting of that person. *In re Bartlett*, 235 N.C. 489, 70 S.E.2d 482 (1952); *Lee v. Beddingfield*, 225 N.C. 573, 35 S.E.2d 696 (1945). Not only did she testify that she recognized her father's handwriting, Mrs. Storms testified that she recognized the checks as being the ones shown to her before the trial by law enforcement officers. She further testified that she recognized the check dated 31 January 1978 in the amount of $300.00 as being one she found in her father's bank statement. The state also offered the testimony of Durward C. Matheny, supervisor of the Questioned Documents Section of the State Bureau of Investigation concerning these same checks. Mr. Matheny testified that the signatures which appeared on the second group of checks which was shown to Mrs. Storms were not made by the same individual who made the signatures on the first group of checks which she identified on the stand. Therefore, we conclude that there was no abuse of discretion on the part of the trial judge in that there was a sufficient foundation laid.

[63] Margie Lee Pittman, daughter of John Henry Lee and Record Lee, identified state's Exhibit Number Three as being a check payable to the Internal Revenue Service bearing her mother's signature. She identified it as being a check that she had written out for her mother and which her mother had signed in her presence the morning after John Henry Lee had been taken to the hospital. Mrs. Pittman also identified state's Exhibit Number Four, a check payable to Bo's Supermarket in the amount of $50.00, as not bearing the authentic signature of her mother. This was a sufficient foundation.

[64] Defendant contends that an improper foundation was laid for the experts who testified as to their opinions of the cause of death of Stewart Taylor, Dolly Taylor Edwards, John Henry Lee and Jennings Barfield. This contention has no merit. The evidence showed that each of the doctors who stated an opinion as to cause of death was a qualified pathologist and that his opinion was based on an autopsy performed on the victim.

[65, 66] The competency of a witness to testify as an expert is a matter addressed to the discretion of the trial court judge and will not be disturbed on appeal if there is evidence in the record to support his finding. *State v. Moore*, 245 N.C. 158, 95 S.E.2d 548 (1956). The absence of an express finding in the record that the witness is qualified as an expert is no ground for challenging the ruling implicitly made by the judge in allowing the witness to testify. 1 Stansbury's North Carolina Evidence § 133 (Brandis Rev.1973). If the record indicates that such a finding could have been made it will be assumed that the judge properly found the witness to be an expert, or that his competency was admitted, or that no question was raised in regard to his competency. *State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977); *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977); *State v. Mitchell*, 283 N.C. 462, 196 S.E.2d 736 (1973). There is sufficient evidence in the record in this case to justify allowing the three doctors to state their opinions as experts as to the cause of the deaths of the individuals in question. There was no abuse of discretion.

Defendant contends that the trial court erred in denying her motion to suppress the statements given by her to Officers Lovette and Parnell. This contention has no merit.

The content of these statements has been set forth previously in this opinion. In short, on 10 March 1978 defendant denied having anything to do with the death of

Stewart Taylor. On 13 March 1978 she gave the officers four separate statements concerning the deaths of Stewart Taylor, John Henry Lee, Lillie McMillan Bullard, and Dolly Taylor Edwards. On *voir dire*, Deputy Sheriff Lovette testified on behalf of the state. According to Lovette, he and Deputy Sheriff Parnell talked with defendant on 10 March 1978 at the Robeson County Sheriff's Department. On that occasion defendant was given her *Miranda* warnings and indicated that she did not want a lawyer at that time. She told the officers that she was willing to talk with them. Officer Lovette further testified that she did not appear to be under the influence of anything. When defendant returned to the sheriff's department to talk with the officers again, she was given her *Miranda* warnings a second time. At that time she was accompanied by her son, Ronald Burke. The officer testified that at the second conference defendant did not appear to be under the influence of anything; that she was upset and crying; and that no promises or threats were made to her.

On *voir dire* defendant testified that on the morning of the second interview she had taken a quantity of drugs: two Sinequans, two Elavils, two Tylenol III, two Tranxenes, and three Valium, and that at no time was she given her *Miranda* warnings. She went on to say "He told me that if I would open up and tell everything it would be much easier on me." Ronald Burke took the stand during *voir dire* and testified that when he went to his mother to take her to the sheriff's office he found a pill container in her hand and that she was wobbly; that she was crying and upset when she talked with the officers; and that Officer Lovette told him that "It will be easier for her."

The judge then made findings of fact and conclusions of law which he entered in the record denying the motion to suppress.

[67–69] G.S. 15A–977(f) requires a judge to make findings of fact and conclusions of law when there is a motion to suppress. Such findings of fact must include findings on the issue of voluntariness. When the evidence is conflicting, the findings of fact must be sufficient to provide a basis for the judge's ruling. *State v. Herndon*, 292 N.C. 424, 233 S.E.2d 557 (1977); *State v. Riddick*, 291 N.C. 399, 230 S.E.2d 506 (1976). The facts so found by the trial court judge are conclusive if they are supported by competent evidence. *State v. Harris*, 290 N.C. 681, 228 S.E.2d 437 (1976); *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1975), *death sentence vacated*, 428 U.S. 908, 96 S.Ct. 3215, 49 L.Ed.2d 1213 (1976). The trial judge found as facts that defendant's statements were voluntary and that no promises or threats were made to her. There is competent evidence in the record which supports those findings.

[70] Defendant argues that it was error to receive her statements into evidence because her *Miranda* warnings were not repeated prior to the making of each statement. This argument is without merit.

Before defendant talked with Officers Lovette and Parnell for the first time on 10 March 1978, she was advised of her constitutional rights by Deputy Lovette. Defendant stated to the officers that she understood her rights and that she did not want a lawyer. At that time, she executed a written waiver of rights form. Before they began questioning the defendant again on 13 March 1978, the officers once more advised her of her rights. In response to the repeated warning, defendant stated that she did not want a lawyer and that she wanted to make a statement. A written waiver of rights form was then read to her and she signed it. After executing the waiver, defendant proceeded to make four separate statements to the officers concerning her involvement in the deaths of Stewart Taylor, John Henry Lee, Dolly Taylor Edwards, and Lillie McMillan Bullard. There was no repetition of *Miranda* warnings before each separate statement was taken.

[71–73] Repetition of *Miranda* warnings is not required where no inordinate time elapses between interrogations, the subject matter remains the same and there is no

evidence that anything occurred in the interval which would serve to dilute the effect of the first warning. *State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977); *State v. Cole*, 293 N.C. 328, 237 S.E.2d 814 (1977); *State v. McZorn*, 288 N.C. 417, 219 S.E.2d 201 (1975), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3210, 49 L.Ed.2d 1210 (1976). The need for a repetition of *Miranda* warnings must be determined by the totality of circumstances of each case. *State v. McZorn, supra*. Among the factors that are to be considered in making this determination are: The length of time between the giving of the first warnings and the subsequent interrogation; whether the warnings and the subsequent interrogation occurred in the same place or in different places; whether the warnings and the subsequent interrogation were conducted by the same or different officers; the extent to which the subsequent statement differed from any previous statements; and the apparent intellectual and emotional state of the suspect at the time of the interrogation. *State v. McZorn, supra*.

[74] In the present case, there were two interrogations of defendant by Officers Lovette and Parnell. During the first interrogation defendant denied any involvement in the death of Stewart Taylor. Before the first interrogation began, defendant was given her *Miranda* warnings. These warnings were repeated before the second interrogation began. During the second interrogation, defendant made four separate statements in the space of a relatively short time. The interrogation took place in the same location where she was given her *Miranda* warnings. The interrogation was conducted by the same officers who advised her of her constitutional rights. The statements which she gave to the officers on 13 March differed from one another because they were each concerned with different incidents. While it is true that there was testimony on *voir dire* which tended to show that defendant had consumed a large quantity of drugs on the morning of March 13, there is no evidence in the record which would suggest that at the time of the interrogation she was under the influence of any substance. That the defendant was crying and otherwise visibly upset at the time of questioning does not by itself prove that she was not sober or otherwise cognizant of what was happening.

By her eleventh assignment of error, defendant contends that the trial court erred in not submitting the defense of insanity to the jury for its consideration. The assignment is without merit.

Defendant entered a plea of not guilty by reason of insanity in addition to a general plea of not guilty. The district attorney was given written notice of defendant's intention to rely upon this defense. Dr. Bob Rollins, a psychiatrist specializing in forensic psychiatry, examined defendant upon her referral to the Forensic Unit of Dorothea Dix State Hospital by the district court. Dr. Rollins testified that though defendant was uncooperative, he concluded that she was competent to stand trial and that she knew the difference between right and wrong. Nothing in his examination led Dr. Rollins to conclude that defendant suffered from any type of mental illness at the time she allegedly administered poison to Stewart Taylor.

Dr. A. Eugene Douglas, a psychiatrist, examined the defendant upon referral on order of Judge Hobgood. Dr. Douglas concurred in the findings and conclusions of Dr. Rollins. Testifying by way of deposition, Dr. Anthony Sainz declined to state an opinion on the sanity of defendant but did testify that in his opinion, defendant was competent to stand trial and knew the difference between right and wrong. Dr. Sainz went on to state that while there was no evidence of mental illness on the part of the defendant, she did have what he termed a passive-aggressive personality with her judgment being immaturely developed.

Defendant argues that she presented sufficient evidence tending to show mental illness and to raise the issue of whether she knew the nature and quality of her act or knew that it was wrong. We find this argument unpersuasive.

[75–77] The test of insanity that is recognized in North Carolina is whether the accused at the time of the commission of the alleged act was laboring under such defect of reason from disease or defect of the mind as to be incapable of knowing the nature and quality of the act or if he does know it was by reason of such defect of reason incapable of distinguishing right from wrong in relation to such act. *State v. Jones*, 293 N.C. 413, 238 S.E.2d 482 (1977). Every person is presumed to be sane and possess a sufficient degree of reason to be responsible for his crimes. *State v. Hicks*, 269 N.C. 762, 153 S.E.2d 488 (1967); *State v. Creech*, 229 N.C. 662, 51 S.E.2d 348 (1949). The burden is on the defendant to prove the defense of insanity to the satisfaction of the jury. *State v. Caldwell*, 293 N.C. 336, 237 S.E.2d 742 (1977), *cert. denied*, 434 U.S. 1075, 98 S.Ct. 1264, 55 L.Ed.2d 780 (1978). A trial judge does not err in failing to place the issue of insanity before the jury where there is no evidence produced at trial that would tend to show that a defendant was insane at the time of the commission of the alleged offense. *State v. Vinson*, 287 N.C. 326, 215 S.E.2d 60 (1975), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3204, 49 L.Ed.2d 1206 (1978); *State v. Melvin*, 219 N.C. 538, 14 S.E.2d 528 (1941).

[78] From the record in the present case, we conclude that the evidence was insufficient to require the trial judge to submit the issue of defendant's sanity to the jury. All three of the psychiatrists who testified concluded that defendant knew the difference between right and wrong. There was no evidence that she did not know the nature and quality of her acts.

Defendant contends that the trial court erred in refusing to dismiss the charges against her, in denying her motion for a directed verdict, in denying her motion to set the verdict aside as being contrary to law and the weight of evidence, in denying her motion for a new trial and in denying her motion for a mistrial on the ground that the prosecutor's behavior amounted to misconduct. These contentions have no merit. There was sufficient evidence to take the case to the jury on the issue of defendant's guilt. Furthermore, the evidence adduced at trial was sufficient to uphold the verdict against a motion for a new trial as well as against a motion to set it aside as being contrary to law and against the weight of the evidence. As we have indicated above, we fail to find that any of the conduct on the part of the district attorney in the prosecution of this case amounted to misconduct.

PHASE II—SENTENCE DETERMINATION

By her fifth assignment of error, defendant contends that the trial court erred in entering a judgment calling for the death penalty because the North Carolina statutes providing for capital punishment, G.S. § 15A-2000 et seq., are unconstitutional. We find no merit in this assignment.

Defendant argues that the statutes are unconstitutional for four reasons: (1) the death penalty amounts to cruel and unusual punishment which is barred by the Eighth and Fourteenth Amendments to the United States Constitution; (2) the sentencing procedure is mandatory in nature; (3) the aggravating and mitigating circumstances prescribed in the statute are too vague; and (4) the state ought to be required to prove that there are no mitigating circumstances before the death penalty may be imposed.

The benchmark by which the constitutionality of G.S. § 15A-2000 et seq. is to be judged is that provided by the landmark case of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny. In *Furman*, the United States Supreme Court held that the Eighth and Fourteenth Amendments to the United States Constitution invalidate any scheme for the imposition of the death penalty when either the judge or jury is permitted to impose that sentence as a matter of unbridled discretion. *See Furman v. Georgia*, 408 U.S. at 253, 92 S.Ct. at 2734, 33 L.Ed.2d at 357 (Douglas, J., concurring); *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973). Only two justices concluded that

capital punishment is *per se* unconstitutional, Justices Brennan and Marshall. For Justices Douglas, Stewart and White, the issue in *Furman* turned on their concern that because of the uniqueness of the death penalty, it ought not to be imposed under sentencing procedures that create a substantial risk that it could be inflicted in an arbitrary and capricious manner.

Justice Stewart concluded that the death sentences examined by the court in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . the petitioners [in *Furman*] were among a capriciously selected random handful upon which the sentence of death has in fact been imposed." *Furman v. Georgia*, 408 U.S. at 309, 310, 92 S.Ct. at 2762, 33 L.Ed.2d at 390 (Stewart, J., concurring). Justice White echoed these sentiments in finding that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 313, 92 S.Ct. at 2764, 33 L.Ed.2d at 392 (White, J., concurring). Justice Douglas eloquently summarized the position of those justices who did not find capital punishment to be *per se* unconstitutional, of which he was one, in observing that ". . . we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries whether defendants committing these crimes should die or be imprisoned. Under these laws, no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12." *Furman v. Georgia*, 408 U.S. at 253, 92 S.Ct. at 2734, 33 L.Ed.2d at 367 (Douglas, J., concurring).

It is appropriate to look to the concurring opinions of these three justices in determining the precise holding of *Furman* in that their concurrences were based upon narrower grounds than those of Justices Brennan and Marshall. Therefore, since the unbridled discretion of judges and juries to impose the death penalty formed the core of the court's disposition of *Furman*, it remained for later cases to carve from the decision clear boundaries within which the imposition of capital punishment would be constitutional.

In the wake of the *Furman* decision, the legislatures of at least 35 states enacted new statutes which called for the imposition of the death penalty for specified crimes. These newly adopted statutes attempted to address the concerns expressed by the Supreme Court in *Furman* primarily by retaining the concept of discretionary power on the part of judges and juries to impose capital punishment but at the same time specifying factors to be weighed and procedures to be followed in exercising that discretion or by making the death penalty mandatory for specified crimes. In a set of cases decided on the same day, the Supreme Court upheld three statutory schemes which called for the death penalty to be imposed as a matter of guided discretion on the part of judges or juries. At the same time, the court declared unconstitutional North Carolina's statute which called for the mandatory imposition of the death penalty upon a finding that the defendant was guilty of one or more enumerated crimes.

The statutory formulas for imposing the death penalty of Georgia, Florida and Texas were upheld in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Though the statutes differed in their particulars, they shared a similar characteristic: each left the decision to impose the death penalty to the *guided* discretion of either the judge or the jury.

After the *Furman* decision, Georgia enacted a new statutory formula for imposing the death penalty. Ga.Code Ann. §§ 26-3102; 27-2503; 27-2534.1; 27-2537 (Supp. 1975). The Georgia statute interpreted in *Gregg* requires that there be a bifurcated trial. In the first stage of the proceeding, the capital defendant's guilt is determined in the traditional manner before a jury or a judge. In the second stage of the trial

after there has been a finding of guilt, a hearing to determine sentence is conducted before whomever made the determination of guilt. At this hearing, the jury or the judge hears additional evidence in mitigation, aggravation, or extenuation of punishment. Evidence in aggravation is limited to that which the state makes known to the defendant before trial. Argument of counsel is permitted. In making a determination of sentence, there must be a weighing of any mitigating or aggravating circumstances authorized by law as well as ten specially enumerated aggravating circumstances enumerated in the statute. The death penalty may be imposed only if the jury or the judge finds at least one of the statutorily enumerated aggravating circumstances beyond a reasonable doubt. Evidence considered during the guilt phase of the trial may be considered during the sentencing phase without being resubmitted. *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12 (1974). The statute provides for a special expedited appeal to the Supreme Court of Georgia. The court is directed to consider any errors brought forward on appeal as well as whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the finding of the statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the particular defendant.

The Florida statute approved in *Proffitt* is similar to that examined in *Gregg* in that it too mandates a bifurcated trial as well as an expedited appeal to the Florida Supreme Court. Fla.Stat.Ann. § 921.141 (Supp.1976–1977). It differs, however, in that it calls for the jury to make, by a majority vote, a recommendation to the judge as to the appropriate punishment. Its finding is only advisory because the actual sentence is determined by the judge. In making that determination, the judge is directed to weigh eight enumerated aggravating factors against seven mitigating factors. The statute further provides for an automatic review by the Florida Supreme Court. It differs from that of Georgia in that it does not require the court to conduct a specific type of review. It is apparent that the basic difference between the Florida scheme and the Georgia approach is that in Florida the sentence is determined by the trial judge rather than the jury.

The Texas system examined in *Jurek* requires that if a defendant is convicted of a capital offense, the trial court must then conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. Tex.Crim.Proc.Code Ann. § 37.071 (Supp.1975–1976). The procedure requires the jury to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of one of the categories of murder specified in the statute. The questions the jury must answer are these:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

If the jury finds that the state has proven beyond a reasonable doubt that the answer to each of the questions is yes, then the death penalty is imposed. If the jury answers any one of the questions no, a sentence of life imprisonment is imposed. The law also provides for an expedited review by the Texas Court of Criminal Appeals. The Texas approach to the imposition of capital punishment differs from that of Georgia in that there is no weighing, as such, of aggravating and mitigating factors. Instead, the jury must answer beyond a reasonable doubt in an affirmative manner each of the three questions submitted to it at the sentencing hearing. The Texas scheme differs from that of Florida in that the jury, rather than the judge, is the ultimate arbiter of punishment.

From the foregoing sketch, it is apparent that the North Carolina statutes dealing with capital punishment are most similar to those of Georgia examined in *Gregg* because of the role of the jury in weighing various aggravating and mitigating factors in a separate sentencing proceeding. Therefore, it is appropriate to analyze the constitutionality of G.S. 15A–2000 et seq. in light of the framework provided by the *Gregg* case. This analysis must not proceed in a vacuum. It must take into account the case of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), decided the same day as *Gregg*. In *Woodson*, the United States Supreme Court struck down as unconstitutional the North Carolina death penalty statute as it was then applied. After *Furman* this court held unconstitutional the provisions of the death penalty statute for first-degree murder, G.S. § 14–17, in the case of *State v. Waddell*, *supra*. This court held further that the provision of the statute that gave the jury the option of returning a verdict of guilty without capital punishment to be severable so that the statute survived as a mandatory death penalty statute. The General Assembly enacted in 1974 a new statute that was essentially unchanged from the old one except that it made the death penalty mandatory upon a finding of guilt. It was this statute that was before the United States Supreme Court in *Woodson*.

In delivering the decision of the court in *Woodson*, Justice Stewart identified three grounds upon which the court found the North Carolina statute to be constitutionally infirm. First, he observed that the mandatory death penalty statute for first-degree murder departed from contemporary standards respecting the imposition of punishment of death in that there was a rejection on the part of society of making death mandatory for certain crimes. Second, he commented that the imposition of a mandatory death penalty for first-degree murder did not respond to *Furman's* rejection of unbridled discretion in imposing the penalty of death. This he found by assuming that juries would weigh the severity of the mandatory punishment in making a determination of guilt or innocence and would exercise unbridled discretion in deciding whether to convict of the capital crime at all. Third, he noted that the statute did not allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the death penalty was imposed upon him. Justice Stewart buttressed this argument by observing that because of the finality of capital punishment, it is qualitatively different from imprisonment for a term of years. Accordingly, he found that there needed to be a finding that death is the appropriate punishment in a specific case. Therefore, it is not enough to examine the constitutionality of the present death penalty statutes under *Gregg*. We must also look to *Woodson* in order to determine if the defects of the prior statute have been corrected.

[79–83] Defendant argues that the death penalty amounts to cruel and unusual punishment barred by the Eighth and Fourteenth Amendments to the United States Constitution. It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); *Gregg v. Georgia*, *supra*. To pass scrutiny under the Eighth Amendment, a penalty must accord with the dignity of man which is the underlying concept of the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. at 173, 96 S.Ct. at 2925, 49 L.Ed.2d at 874; *Trop v. Dulles*, 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). At the very least, this means that the punishment must not be excessive. *Gregg v. Georgia*, 428 U.S. 173, 96 S.Ct. at 2926, 49 L.Ed.2d 875. Whether a penalty is excessive must be determined in light of two considerations. First, a penalty may be excessive and unconstitutional if it makes no measurable contribution to acceptable goals of punishment and is nothing more than the needless and purposeless imposition of pain and suffering. *Coker v. Georgia*, 433 U.S. at 592, 97 S.Ct. at 2865, 53 L.Ed.2d at 989; *Gregg*

v. Georgia, 428 U.S. at 173, 96 S.Ct. at 2925, 49 L.Ed.2d 875. *See also Wilkerson v. Utah*, 99 U.S. 130, 136, 25 L.Ed. 345, 348 (1879) ("It is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty are forbidden by that amendment.") Second, the punishment inflicted must not be grossly out of proportion to the severity of the crime. *Coker v. Georgia*, 433 U.S. at 592, 97 S.Ct. at 2865, 53 L.Ed.2d at 989; *Trop v. Dulles*, 356 U.S. at 100, 78 S.Ct. at 598, 2 L.Ed.2d at 642; *Weems v. United States*, 217 U.S. 349, 381, 30 S.Ct. 544, 554-555, 54 L.Ed. 793, 804 (1910). In weighing these considerations, courts must give attention to public attitudes concerning a particular penalty as deduced from history and precedent, legislative action, and the conduct of juries. *See Coker v. Georgia*, 433 U.S. at 592, 97 S.Ct. at 2866, 53 L.Ed.2d at 989. In *Gregg*, the United States Supreme Court held that the death penalty for first-degree murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the severity of the crime. *Gregg v. Georgia*, 428 U.S. at 187, 96 S.Ct. at 2932, 49 L.Ed.2d at 882. We are in agreement with that holding.

Defendant argues that the North Carolina death penalty is mandatory in nature. It is at this point that we must consider G.S. § 15A-2000 et seq. in light of *Woodson v. North Carolina*, *supra*. It will be recalled that *Woodson* declared the mandatory death penalty North Carolina then imposed to be unconstitutional. There were three grounds upon which the finding of unconstitutionality was based. First, Justice Stewart noted that the mandatory death penalty departed from society's rejection of the practice of making capital punishment mandatory. Second, he observed that juries would weigh the severity of the penalty in making the determination of guilt or innocence. In short, they would exercise unbridled discretion in deciding whether to convict of the capital crime at all. Because of this, a mandatory death penalty does not adequately achieve the issues raised in *Furman*. Third, a mandatory death penalty does not allow for the particularized consideration of the relevant aspects of the character and record of each convicted defendant before the sentence of death is imposed upon him. To carry her argument that the present death penalty statutes are mandatory in nature, defendant must establish that the infirmities of the old statute which were identified in *Woodson* have not been corrected. We are not persuaded that the present statutes provide for the mandatory imposition of the death penalty.

The apparent simplicity of the manner in which the prior statute operated was its constitutional downfall. Under former practice, a defendant who was found guilty of first-degree murder was invariably sentenced to death. Sentence would be pronounced without an examination of the particular facts and circumstances relating to the commission of the crime or to the defendant. Insofar as sentencing was concerned, the law was blind in its operation and application. However, mindful of the mandatory sentence which attached upon a conviction of first-degree murder, juries were free to exercise wide latitude over the sentence to be imposed by their conduct at the guilt determination stage of the trial. This conduct was not subject to any guidance or structure of any kind except for the instructions which the trial court judge gave to the jury before they retired to deliberate. Therefore, at one and the same time, a mandatory death penalty allows two distinct constitutional infirmities to have free play even though they are polar opposites to one another. Juries are allowed to have too much discretion in their determination of defendant's guilt; while at the sentencing phase of the proceeding there is no discretion to be exercised whatsoever. We conclude that the present North Carolina death penalty statutes overcome the problems identified in *Woodson*.

First, the determination of guilt is entirely divorced from the imposition of punishment. Though the same jury that made the determination of guilt may make the determination of punishment, it makes that determination at a different time, subject to a different set of instructions from the trial

judge. Therefore, the issue of jury nullification of the instructions of the court by refusing to convict of the capital offense is diffused. In making the finding of guilt or innocence, the jury now does not invariably weigh the probable punishment. In addition, the evidence that it considers in the punishment phase of trial is not necessarily the same as that it dealt with in finding the defendant guilty. Though it may consider evidence previously introduced at the guilt determination stage, it is not limited to that evidence. Additional evidence in mitigation as well as aggravation may be introduced. Additional argument of counsel is permitted. In short, the nature of the bifurcated trial itself serves to prevent the issue of probable punishment from bleeding over into the determination of guilt or innocence. In so providing, the present North Carolina death penalty statutes recognize not only what Justice Stewart perceived to be society's rejection of the mandatory imposition of the death penalty but also the actual conduct of juries in weighing the guilt or innocence of the accused.

Second, while the present statutes serve to diffuse the issue of jury discretion in the process of guilt determination, they also provide for the exercise of *guided* discretion at the sentencing stage of the proceeding. After hearing the evidence, arguments of counsel, and further instructions of the trial court judge, the jury is required to deliberate and render a binding sentence recommendation to the court. This recommendation is not presented until the jury has engaged in a two-step process. Initially, the jury must determine which of the aggravating and mitigating circumstances exist on the basis of the evidence presented. If it finds that none of the statutory aggravating circumstances exist beyond a reasonable doubt, the inquiry is at an end and the defendant is sentenced to life imprisonment. If, however, the jury finds that any of the statutory aggravating circumstances exist, it must determine whether they outweigh any mitigating circumstances in a sufficiently substantial manner so as to call for the imposition of the death penalty. It is this process that overcomes the problem spotlighted in *Woodson*: a mandatory death penalty does not allow for the particularized consideration of the relevant aspects of the character and record of a convicted defendant. Furthermore, a mandatory death penalty does not allow the singular characteristics of the conduct found to be criminal to be weighed in the balance in the imposition of sentence as is invariably done in the finding of guilt.

While there is discretion at this stage of the process, it is not discretion that is constitutionally forbidden. It is discretion which is guided by the very language of the statute and the process by which it is implemented. Prior to *State v. Waddell*, *supra*, juries had uncontrolled discretion as to the punishment to be imposed in a capital case. A jury then had the power to sentence a convicted capital defendant to life imprisonment by so recommending at the time it rendered its verdict. While it is true that the present statute empowers the jury in effect to impose sentence upon the defendant, that decision is not made blindly. No defendant may be sentenced to death unless and until the jury finds at least one statutory aggravating circumstance to exist beyond a reasonable doubt which outweighs any mitigating circumstance in a sufficiently substantial manner so as to call for the death penalty. No aggravating circumstance which is not provided by the language of the statute may be considered by the jury in imposing sentence. G.S. 15A-2000(e). In this respect, our statute is significantly more narrow than the statute which was upheld in *Gregg*. The Georgia death penalty statute which was at issue in that case allowed a jury to consider "any . . . aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence . . ." Ga.Code Ann. § 27-2534.1(b) (Supp.1975). It is apparent that juries operating under the Georgia procedure have greater discretion in imposing the death penalty than do juries in North Carolina. While the present North Carolina statute enumerates several mitigating factors to be considered by the

jury, it does not limit the jury in its consideration of mitigating factors. A North Carolina jury is specifically empowered to consider "[A]ny other circumstance arising from the evidence which the jury deems to have mitigating value." In short, while the jury's discretion to impose the death penalty is sharply limited, it retains wide discretion to consider the particular circumstances of the defendant and his conduct so that the punishment which is ultimately imposed is not grossly disproportionate to the crime.

[24] It is clear from the foregoing discussion that the present North Carolina death penalty statutes are not mandatory in nature but instead provide for the exercise of guided discretion in the imposition of sentence.

Defendant further argues that the North Carolina death penalty statutes are unconstitutional because they fail to give to the jury objective standards to guide it in weighing aggravating against mitigating circumstances in passing upon the issue of sentence. In particular, defendant contends that the aggravating circumstances are vague and without accurate definition. Intertwined with that contention is the further argument that the jury is given no guidance in how it is to go about determining whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances found. Defendant's argument is not persuasive.

As a general proposition, a jury is not likely to be skilled as a body in handling the information which is brought before it on the issue of punishment. *See Gregg v. Georgia*, 428 U.S. at 192, 96 S.Ct. at 2934, 49 L.Ed.2d at 883. However, the jury's inexperience in digesting the information presented to it can be overcome if it is given sufficient guidance regarding the relevant factors about the defendant and the crime he was found to have committed. *Id.* Appropriate sentencing standards operate to reduce the risk that the death penalty will be imposed in an arbitrary or capricious manner. In the words of Justice Stewart, "[I]t is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." *Gregg v. Georgia*, 428 U.S. at 192, 96 S.Ct. at 2934, 49 L.Ed.2d 866. Appropriately framed and submitted sentencing standards allow a jury to consider on the basis of all the relevant evidence not only why the death sentence should be imposed but also why it should not be imposed. *Jurek v. Texas*, 428 U.S. at 271, 96 S.Ct. at 2956, 49 L.Ed.2d at 933.

[25] Sentencing standards are by necessity somewhat general. While they must be particular enough to afford fair warning to a defendant of the probable penalty which would attach upon a finding of guilt, they must also be general enough to allow the courts to respond to the various mutations of conduct which society has judged to warrant the application of the criminal sanction. *See Gregg v. Georgia*, 428 U.S. at 194–195, 96 S.Ct. at 2935, 49 L.Ed.2d at 886–887. While the questions which these sentencing standards require juries to answer are difficult, they do not require the jury to do substantially more than is ordinarily required of a factfinder in any lawsuit. *See Proffitt v. Florida*, 428 U.S. at 257–258, 49 L.Ed.2d at 926, 96 S.Ct. at 2969. The issues which are posed to a jury at the sentencing phase of North Carolina's bifurcated proceeding have a common sense core of meaning. Jurors who are sitting in a criminal trial ought to be capable of understanding them and applying them when they are given appropriate instructions by the trial court judge. *See Jurek v. Texas*, 428 U.S. at 279, 96 S.Ct. at 2959, 49 L.Ed.2d at 939 (White, J., concurring).

Defendant's attack upon the constitutionality of the present North Carolina death penalty statutes concludes with the assertion that due process of law requires the state to bear the burden of proof that in a given case no mitigating circumstances exist. We find no merit in this argument.

[26-27] Due process requires the state to bear the burden of proving beyond a reasonable doubt each element of a substantive criminal offense. *Mullaney v. North Carolina*, 422 U.S. 683, 97 S.Ct. 2329, 53

L.Ed.2d 306 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, the concept of due process does not require that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses which are related to the culpability of an accused. *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Nor does due process require a state to disprove beyond a reasonable doubt the existence of a factor which mitigates the degree of criminality or punishment. *See Cole v. Stevenson*, 447 F.Supp. 1268 (E.D.N.C.1978).

[89] In light of the foregoing discussion, we hold that the North Carolina death penalty is constitutional.

Although defendant has not brought forward and argued to this court any assignment of error which relates to the submission of a particular aggravating circumstance to the jury, in view of the penalty that has been imposed, we have carefully considered those that were submitted. We conclude that the trial court did not err in this respect. *See State v. Goodman*, —— N.C. ——, 257 S.E.2d 569 (1979).

* * * * * *

As a check against the capricious or random imposition of the death penalty, this court is empowered to review the record in a capital case to determine whether the record supports the jury's findings of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. G.S. 15A-2000(d)(2).

[90] We do not take lightly the responsibility imposed on us by G.S. 15A-2000(d)(2). We have combed the record before us. We have carefully considered the briefs and arguments which have been presented to us. We conclude that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it. We find nothing in the record which would suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. The manner in which death was inflicted and the way in which defendant conducted herself after she administered the poison to Taylor leads us to conclude that the sentence of death is not excessive or disproportionate considering both the crime and the defendant. We, therefore, decline to exercise our statutory discretion to set aside the sentence imposed.

No error.

BROCK, J., took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF ROBESON

SUPERIOR COURT DIVISION

Robeson County File # 78 CrS 4928
Bladen County File # 78 CrS 8262

STATE OF NORTH CAROLINA *
*
vs *
*
MARGIE BULLARD BARFIELD *
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J U D G M E N T

An evidentiary hearing was held on Monday, November 17, 1980 through Friday, November 21, 1980, with decision day on Wednesday, November 26, 1980. The defendant was personally present. She was represented by James D. Little, attorney of Fayetteville, North Carolina and Richard H. Burr, III, an attorney licensed in the state of Kentucky and appearing on behalf of the defendant through the Southern Prisoners Defense Committee of Nashville, Tennessee. The State was represented by Joe Freeman Britt, District Attorney for the 16th Judicial District and Donald W. Stephens, Assistant Attorney General of the State of North Carolina.

1. This proceeding was initiated by the filing of a Motion for Appropriate Relief on October 3, 1980 in the Superior Court of Bladen County. The case originated in Robeson County. Order for Change of Venue from Robeson County to Scotland County was entered on May 5, 1978. Order for Change of Venue from Scotland County to Bladen County was entered on November 1, 1978. Bladen County was the county for trial and for direct appellate review. A true bill of indictment charging the offense of murder in the first degree, with date of offense alleged as January 31, 1978, was returned at the March 28, 1978 Criminal Session of the Superior Court of Robeson County. The defendant was convicted by a jury of the capital felony

of murder in the first degree and was sentenced to death. Judgment was entered on the 2nd day of December 1978 in Bladen County.

2. Defendant appealed her conviction and sentence to the Supreme Court of North Carolina. On November 6, 1979 the Supreme Court of North Carolina found no error. It upheld defendant's conviction and sentence. State v Barfield, 298 NC 306 (1979).

3. Following the decision by the Supreme Court of North Carolina, the defendant petitioned the United States Supreme Court for a writ of certiorari. Her petition was denied on June 30, 1980. The defendant filed a petition for rehearing with United States Supreme Court, and rehearing was denied on September 17, 1980.

4. Defendant's execution date was rescheduled for October 17, 1980 by the operation of G.S. 15-194, after she exhausted appellate procedure for direct review.

5. Defendant is currently incarcerated at the North Carolina Correctional Center for Women in Raleigh, North Carolina .

6. The defendant is indigent and unable to pay the costs of these proceedings. Defendant has made independent arrangement for the employment of her present counsel, and the State of North Carolina is not obligated to pay for same.

7. A history of the sequence of motions and orders filed in this proceeding follows:

(a) Original Motion for Appropriate Relief, October 3, 1980.

(b) Motion to Amend Motion for Appropriate Relief, October 7, 1980. It was incorporated within the Order for plenary hearing.

(c) An Order for plenary hearing on the motion for appropriate relief of October 3, 1980, as amended, was entered on October 9, 1980, setting hearing date for November 17, 1980.

(d) An Order for the stay of execution of defendant through all

proceedings connected with the motion for appropriate relief in the trial division was entered on October 9, 1980.

(e) An Order for removal of the entire case, and for hearing on motion for appropriate relief was entered on October 9, 1980, removing the case from Bladen County back to Robeson County, the county of origin.

(f) An Order allowing the appearance as counsel of Richard H. Burr, III of the Kentucky Bar, under the provisions of G.S. 84-4.1, dated October 21, 1980, filed October 23, 1980.

(g) Motion for Information from the Supreme Court of North Carolina, dated October 24, 1980, filed October 27, 1980.

(h) Motion for Findings by the Court pursuant to G.S. 15A-1411 et. seq., dated October 24, 1980, filed October 27, 1980.

(i) Order Denying Motion for Findings by the Court pursuant to G.S. 15A-1411 et. seq., dated November 3, 1980, filed November 5, 1980.

(j) Order Denying Motion for Information from the Supreme Court of North Carolina pursuant to G.S. 15A-1411, et. seq., dated November 3, 1980, filed November 5, 1980.

(k) Petition for Writ of Habeas Corpus Ad Testificandum, dated November 5, 1980.

(l) Order allowing Writ of Habeas Corpus Ad Testificandum, dated November 6, 1980, filed November 7, 1980.

(m) A defense Motion for Discovery of Attorney's Files, with release and waiver by defendant dated November 6, 1980 was filed on November 7, 1980. Hearing on motion was held on November 17, 1980. It was allowed in part and denied in part as will appear of record.

(n) On November 6, 1980 the defendant filed a Motion for Leave to File Amended Motion for Appropriate Relief. Hearing was held on November 17, 1980. Motion was allowed. The document as filed is captioned "Amended Motion for Appropriate Relief".

(o) On November 11, 1980 the defendant filed a Motion to Amend Motion for Appropriate Relief. It was heard on November 17, 1980. Motion was

allowed. This amendment concerns itself only with paragraphs 18 and 26 of the "Amended Motion for Appropriate Relief".

Thus, the document captioned "Amended Motion for Appropriate Relief", dated November 6 and filed on November 7, 1980, and the document called "Motion to Amend Motion for Appropriate Relief", dated November 11, 1980 and filed November 12, 1980, together constitute the motion for appropriate relief which is the defendant's pleading upon which this hearing was held in the Superior Court.

(p) Pretrial, on November 17, 1980, the Court heard the State's Motion to Quash a defense subpoena for Donald W. Stephens, Assistant Attorney General of North Carolina. It was dated and filed November 17, 1980. It was allowed in part and denied in part. Although present throughout the trial, he was never called by the defendant to testify.

(q) On November 17, 1980 the Court heard the State's Motion, dated and filed on November 17, 1980, to Quash the Subpoena for the Chief Justice of the North Carolina Supreme Court. Motion to quash was allowed.

(r) The original and current Robeson County case number is 78 Cr 4928. The Bladen County case number is 78 Cr 8262. These two case numbers refer to the identical case and are all now jointly consolidated in Robeson County in 78 Cr 4928.

The Court finds that the defendant has alleged and contends that her constitutional or legal rights were denied or violated in each of the following respects:

8. Her court-appointed counsel failed to provide her with representation within the range of competency demanded of defense attorneys in capital punishment prosecutions at her trial and on appeal to the North Carolina Supreme Court. The specific allegations are that attorney Jacobson:

(a) Spent only 8-10 hours with the defendant during the 8½ months between his appointment and trial.

(b) Failed to present her at her trial as the complex, troubled, but sympathic figure that she is.

(c) Failed to interview and/or call numerous witnesses who were well situated to help explain the defendant to the jury.

(d) Failed to have the defendant fully evaluated by a psychiatrist or psychiatrists.

(e) The psychiatric testimony given on behalf of defendant at trial was fundamentally inadequate , in that such testimony:

(1) failed to reveal and discuss defendant's (probable) serious mental illness, which had potentially great defense and mitigational value;

(2) failed to describe and document the effects on the defendant of the drugs she had ingested at the time of the charged homicide, and

(3) completely glossed over a previously diagnosed psychosis from which defendant likely suffered at the time of the charged homicide, and that the psychiatric testimony offered on behalf of the defendant in the guilt phase of her trial had the effect of showing defendant to be sane and rational at the time of the murder with which she was charged.

(f) Failed to prosecute his motion for the appointment of additional counsel effectively.

(g) Failed to engage in the systematic exhaustive pretrial motion practice, which is necessary to the effective defense of capital cases.

(h) Failed to have defendant testify as to the effect her ingestion of a large quantity of drugs had on her capacity to appreciate the criminality of her conduct, or to conform her conduct to the requirements of law.

(i) failed to properly present his closing argument: "Counsel's closing argument on behalf of defendant in the guilt phase of her trial relied exclusively on testimony concerning the defendant's mental illness and ingestion of drugs to negate the element of defendant's intent in the charge of first degree murder. However, . . . counsel had presented no testimony on behalf of defendant concerning the effect on defendant's homicidal intent of such conditions." Paragraph 10(i).

(j) Failed to present in the sentencing phase any additional evidence concerning the defendant or the death penalty which could evoke feelings of mercy for the defendant, and failed to provide the jury with information during the guilt phase through which they could understand and empathize with the defendant, which resulted in a dehumanized and unavoidable view of the defendant as a coldblooded killer.

(k) Failed, in his closing argument in the penalty phase, to present any basis upon which the jury could exercise mercy, and himself succumbed to the dehumanized view of the defendant to which the defense case had contributed significantly.

(l) Failed to approach and consider a plea of guilty in a reasonable fashion.

(m) Failed to request jury instructions for the crime of voluntary manslaughter in the guilt phase.

(n) Failed to request a new jury for the sentencing phase, despite the admission solely in relation to guilt issues of proof that defendant murdered four other persons by means of arsenic poisoning.

(o) Failed to argue effectively or totally failed to raise numerous legal issues at defendant's trial and on appeal of defendant's conviction and sentence to the North Carolina Supreme Court.

9. Defendant was deprived of the right to a more reliable determination of guilt inhering in capital cases by the introduction at her trial of evidence concerning four homicides allegedly committed by her, but for which she was not charged. The specific allegations are:

(a) Defendant was indicted and tried solely for the murder of Stewart Taylor.

(b) The prosecution presented evidence that the defendant also murdered, by poisoning, John Henry Lee, Dolly Taylor Edwards, Lillian Bullard, and Jennings Barfield.

(c) Testimony concerning these other murders was admitted solely to show that Mrs. Barfield had the requisite knowledge to be convicted for the murder of Stewart Taylor, and that she acted pursuant to a common

scheme or plan. She contends that the prejudicial effect of this testimony outweighed its relevance, and that the admission of such testimony introduced a substantial factor of unreliability into her capital trial.

10. Defendant has been deprived of her right not to be a witness against herself by the admission into evidence at her trial of statements made by her to officers of the Robeson County Sheriff's Department while in the custody of such officers, without a voluntary and intelligent waiver of her rights. The specific allegations are Paragraph 12(a) through (d):

(a) "Mrs. Barfield was questioned on March 13, 1978 about the crime with which she was charged in the custody of two officers of the Robeson County Sheriff's Department."

(b) "On this occasion, Mrs. Barfield was substantially under the influence of drugs, was quite upset, and could not remember past events very well."

(c) "The testimony is uncontradicted that Mrs. Barfield was simply reminded by Officer Lovette that she 'still had her rights,' which had been explained to her three days earlier, and an incriminating statement was then taken from her."

(d) "Only after such statement was taken was Mrs. Barfield fully advised in writing of her rights."

11. Defendant has been deprived of the right to a more reliable guilt determination inhering in capital cases by the instructions to the jury at the close of the guilt phase of her trial concerning the elements of first degree murder and second degree murder. The specific allegations are:

(a) Of the four elements comprising first degree murder, the Court's instructions failed to distinguish clearly between two elements: malice and intent."

(b) Since intent is the only element not present in second degree murder, this lack of clarity is significant, for the difference between first and second degree murder thus becomes confused and unguided."

12. Defendant has been deprived of her right to due process by the trial court's instructing the jury in the guilt phase of defendant's trial that two factual elements of first degree murder -- premeditation and deliberation -- must be conclusively presumed because the murder was perpetrated by means of poison.

13. Defendant has been deprived of her right to the guided exercise of jury sentencing discretion in a capital case by the submission to the jury of three aggravating circumstances which were submitted at her trial. The specific allegations are:

(a) The aggravating circumstances submitted to the jury at defendant's trial were:

(1) the murder was committed for pecuniary gain,

(2) the murder was committed to hinder the enforcement of law, and

(3) the murder was especially heinous, atrocious, or cruel.

(b) The first and second aggravating circumstances, in the context of this case, apply to the same essential fact: The murder was committed to avoid prosecution for forgery.

(c) The third aggravating circumstance, by its application to the facts in this case, is likewise rendered useless as a guide to discretion, for its application here signals its application to every murder in which death is noninstantaneous.

14. Defendant has been deprived of her right to the guided exercise of jury sentencing discretion in a capital case by the trial court's numerous instructional errors concerning mitigating circumstances and the role they must play in the determination of a sentence. The specific allegations are:

(a) Failed to instruct the jury to consider the mitigating circumstances set forth at G.S. 15A-2000 (f)(1), in reference to no significant history of prior criminal activity, and in reference to

Section (f)(5) that defendant acted under duress.

(b) Failed to explain adequately the psychiatric mitigating circumstances set forth at G.S. 15A-2000 (f)(2) and (6), and failed to differentiate these circumstances adequately from the M'Naghten test of insanity.

(c) Failed to instruct the jury adequately concerning the existence of "other circumstances" having mitigating value.

(d) Failed to instruct the jury on the burden and standard of proof required for the proof of mitigating circumstances.

(e) Failed to instruct the jury to give independent weight to the mitigating circumstances, and instead , instructed the jury in such a way that the mitigating circumstances were confined to a role of simply outweighing aggravating circumstances, in the absence of which a death sentence was required.

15. Defendant has been deprived of her right to the guided exercise of jury sentencing discretion in a capital case by the failure of the trial court to instruct the jury at the sentencing phase to disregard all proofs of homicides committed by the defendant, other than the Taylor homicide. The specific allegations are:

(a) The testimony concerning the homicides committed by the defendant, other than the Taylor homicide, was admitted solely because of its relevance to defendant's intent to kill Taylor and to her knowledge of the effects of arsenic on human beings.

(b) The "other homicides" testimony was not admitted to prove that defendant was a "mass murderer".

(c) While such testimony could not, therefore, be weighed in relation to defendant's culpability, it nonetheless became a factor in determining defendant's culpability, because the district attorney argued in the sentencing phase that the jury should remember that the Taylor murder was the fifth in a series of murders committed by defendant.

16. Defendant has been deprived of her right to be protected from

an unreasonable and arbitrary verdict by the trial court's instruction to jurors that their recommendation must be unanimous and by the trial court's simultaneous failure to advise the jurors of the consequences of their failure to reach a unanimous verdict as to sentence.

17. Defendant has been deprived of her right to be protected from an unreliable and arbitrary verdict by the trial court's inaccurate, misleading summary of defendant's proof in its charge to the jury at the end of the sentencing phase of the defendant's trial. The specific allegations are that the trial court:

(a) Repeatedly implied that defendant's proof conceded that the homicide of Stewart Taylor was an intentional killing.

(b) Repeatedly confused the defendant's proof concerning her mental illness with her proof concerning the effect of drugs on her mental state, never stating the two as distinct problems, each having an effect on the other.

18. Defendant has been deprived of her right to a representative, impartial jury, reflective of contemporary community values by the exclusion of prospective jurors for cause solely on the basis of their opposition to capital punishment. The specific allegations are:

(a) Eleven prospective jurors, jurors Nye, Williams, Patrick, Benjamin, Dent, Rosher, Grimes, McKoy, Andrews, Allen, and Perkins were excluded from serving on defendant's jury solely because of their opposition to capital punishment.

(b) Juries from which death-scrupled jurors have been excluded, in addition to being nonrepresentative and nonreflective of contemporary community values, are not impartial on the issue of guilt, but are prosecution prone and more likely to convict than are juries in which death-scrupled jurors are included.

19. Defendant has been deprived of her right to an impartial jury by the exclusion for cause of juror Dent, who despite expressing general opposition to the death penalty, never stated that he was irrevocably committed to vote against it. The specific allegation is: The voir dire examination

of juror Dent.

20. Defendant has been deprived of her right to have the North Carolina Supreme Court review her sentence to determine whether it is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The specific allegations are:

(a) In reviewing her case on appeal, the North Carolina Supreme Court failed to conduct a proportionality review of Mrs. Barfield's sentence.

(b) While G.S. 15A-2000(d)(2) requires proportionality review, the North Carolina Supreme Court has taken none of the steps necessary to implement this provision of the statute --- e.g., the Court has set up no mechanism for gathering sufficient data about capital cases upon which proportionality review can be conducted, and the Court has done nothing to define the pool of cases from which "similar" cases will be drawn for proportionality review.

21. Defendant has been deprived of her right to be tried and sentenced by a process free of arbitrary decision making in violation of G.S. 15A-2000(d)(2). The specific allegations are:

(a) The race of the victim is the prime determining factor for whether a capital defendant is sentenced to life or death in North Carolina.

(b) Since the effective date of the current death penalty statute, June 1, 1977, 16 people have been sentenced to death, and there have been 19 murder victims associated with these 16 people.

(c) Of the 19 victims of death sentenced defendants, 17 or 89.4% have been white and only two or 10.6% have been black.

(d) No other demographic characteristic is even close to race of the victims as an "explainer" of death sentences in North Carolina.

22. Defendant has been sentenced under a statute, G.S. 15A-2000 et. seq., which is unconstitutional, in that G.S. 15A-2000(d) grants expanded jurisdiction to the Supreme Court of North Carolina without a constitutional

amendment, and is in effect, a violation of Article IV, Section 12 of the North Carolina Constitution.

23. It is alleged that defendant's conviction and sentence must be vacated and set aside on the basis of newly discovered evidence, which has a direct and material bearing upon the guilt or innocence of the defendant, and upon the determination of defendant's sentence. Such newly discovered evidence includes, but is not limited to, the following:

(a) evidence that defendant was insane under any legal test of sanity at the time of the charged murder, and

(b) evidence that would have had substantial mitigating value.

24. The North Carolina Supreme Court failed to review the record in defendant's case to determine whether the sentence was imposed in an arbitrary manner, in violation of G.S. 15A-2000(d)(2). While the Court purported to conduct such a review, it failed to review the issues set forth herein. Each of these issues injected an element of arbitrariness into the process by which Mrs. Barfield was sentenced to death.

The defendant, who is the petitioner, offered evidence. The State offered no evidence. A summary of the facts as found by the Court follows:

25. Robert Dale Jacobson of the Robeson County Bar, Lumberton, North Carolina was the attorney representing the defendant in all the original trial and appellate proceedings, and is the attorney whose competency is now being challenged by the defendant.

(a) Mr. Jacobson was graduated from the University of Iowa, School of Law in June 1967, and was admitted to the Bar in Iowa in June 1967. Thus, at the time of the trial complained of, he had been licensed for 11 years. On September 15, 1967 he entered military service as a judge advocate. In time he worked as both prosecution and defense counsel. No capital cases were prosecuted or defended while working as a judge advocate. From November 1971 until August 1973 he worked as an Assistant Attorney General of the

State of Iowa. His primary duties were with the Criminal Appeals Division in the Supreme Court. For 9 months he was head of the Criminal Appeals Division. As Iowa had no capital punishment statute, then or now, he handled no capital punishment cases in Iowa.

(b) Mr. Jacobson came to Lumberton North Carolina about August 1973. Initally, as he was not licensed here, he worked in the nature of a paralegal to the lawfirm of Johnson, Hedgpeth, Biggs & Campbell. In May 1974 Mr. Jacobson was licensed to practice law in North Carolina, by reciprocity. He started courtroom practice in May 1974. Thus, he was licensed in North Carolina four years prior to the trial of this case. Originally, approximately 40% to 50% of his practice was criminal. It is now over 50%. He has been on the list for court-appointed cases from the beginning. At the time of his appointment to this case it was the rule that a local attorney took all of the cases each week in the Lumberton District Court wherein the judge had found the defendant to be indigent, and had assigned counsel. It was "his week", and he was appointed by the presiding judge, Charles G. McLean, of the District Court to represent Margie Bullard Barfield on the 14th day of March 1978.

(c) Although this was Mr. Jacobson's first capital case, it was not his first murder case. James Carmichael was successfully defended by him on a charge of murder in the first degree, with a verdict of not guilty. His second case of murder in the first degree involved a female juvenile, age 11 or 12. Under the North Carolina law her case was handled in the Juvenile Court Division, and she was committed to a training school. On August 21, 1978 Mr. Jacobson was court-appointed to represent Daniel Webster Wilkens on the capital charge of murder in the first degree. On November 17, 1978 he was court-appointed to represent Vincent Johnson on the capital charge of murder in the first degree.

(d) This being his first capital case meant that he would and did work and try harder than in other cases. He had no trouble in talking with his client and understanding her. He discussed with her the use of drugs, the chance she might be convicted of second degree murder, and discussed

mitigating and extenuating circumstances. He talked to doctors, psychiatrists, pharmacists, family members, other attorneys and his own Aunt Margie, who is a psychiatrist, in order to get background information and to prepare his case. He talked to the psychiatrists by telephone, and wrote letters to them about his client, and talked with them at trial. He talked with the defendant at the jail, at Dorothea Dix Hospital, in the days preceding trial, and throughout the week of the trial itself. He talked to her in District Court on the same day of his appointment.

(e) He decided who to call as witnesses based on the witness and his own experience, and in consideration of this being a capital case. His purpose for her testifying was to show that she took all of those drugs, that she was a poor person, that she had to struggle to get by, that she had seen many doctors, that medicines had been over prescribed, and that she took them against their wishes and in combination, that she was using her doctors, and that considering he was able to get into evidence some 40 or 50 pill bottles belonging to the defendant, he felt that he had done well on all of this on direct examination that was presented to the Court.

(f) He made the decision to put her on the witness stand. She had repeatedly said to him that she had no intent to kill, and that he wanted the jury to hear and know this from her. They discussed and practiced her testimony several times and days. He counseled her to be a sympathic witness, to look like somebody's mother, to evoke sympathy for herself, to help herself, not to get into any arguments with the district attorney on cross-examination, and to cry. On the witness stand she wanted to argue about the cause of death and that she did not intend to do it. She got into an argument with the district attorney.

(g) He knew that the district attorney was going to try to get into evidence all of the other deaths, and he was familiar with the law. He got a copy of all her statements and all the death certificates.

(h) He engaged in plea bargaining, and offered the district attorney five back-to-back sentences. The district attorney turned him down in all of these discussions. He sought assistance of an in-law of the victim

but was unsuccessful. He sought a plea through the assistance of Judge Hamilton Hobgood, who heard some of the pretrial motions, but no agreement could be reached by those involved.

(i) She would not enter an open plea, and neither would he enter an open plea of guilty to a capital offense absent a plea bargain. It was her feeling and his feeling that she had not intended to do this, and they had a good shot at second degree murder.

(j) His attempt at eliciting jury sympathy failed.

(k) At the end of the district attorney's jury agrument, he was told that his client gave a "silent" slap of hands of approval and he reprimanded her for it. She never gave the impression that she wanted forgiveness --- that she never cried at any time. His belief is that if she had followed his counseling, she would have gotten a life sentence.

(l) He engaged in pretrial motion practice. He personally talked to the investigating officers outside the presence of the district attorney without any interference from the district attorney and the officers were very candid with him. He did not ask for an investigator. He did not make a "Brady" motion. What the district attorney did give him was exculpatory in nature.

(m) He made a motion for psychiatric evaluation, defendant's exhibit 5, and the defendant was committed to Dorothea Dix State Hospital.

(n) He made a motion to request additional counsel, defendant's exhibit 7. He orally asked Superior Court Judge Hobgood for additional counsel about the time of arraignment. This was not put on the record because he knew his record was protected from the District Court.

(o) He made a motion for expert witnesses and payments of fees, defendant's exhibit 8.

(p) He knew that an SBI handwriting analysis expert would testify. That he did not ask for a handwriting expert because he knew the defendant would, and did, testify that all signatures on the questioned documents were written by her while she was under the influence of drugs, and therefore, he did not feel it necessary to get a handwriting expert.

(q) He did not ask for information by discovery of the other four deaths because no charges existed in the other four cases. He did get the death certificates of those four.

(r) He made a motion for individual voir dire of the jury and sequestration of jurors during the voir dire, defendant's exhibit 12.

(s) He made a motion for complete recordation of all proceedings, defendant's exhibit 22.

(t) He made a motion for change of venue, defendant's exhibit 10.

(u) He made a motion to supress the statement or confession of the defendant, defendant's exhibit 14. The motion to supress was heard during the trial, and this was the usual procedure.

(v) He made a motion for an independent psychiatrist, defendant's exhibit 15.

(w) He filed a motion giving notice of psychiatric defense.

(x) Pursuant to his motion, he was able to take during trial the deposition of Dr. Sainz at the Cape Fear Valley Hospital in Fayetteville. As both the original decision in the North Carolina Supreme Court and evidence at this evidentiary hearing shows, Dr. Sainz later died.

(y) He made a motion for a continuance of the trial so as to get Dr. Sainz into the courtroom to testify.

(z) He did not make a motion to have Judge Henry A. McKinnon, Jr. recuse himself. He wanted Judge McKinnon in this case.

(a.a.) He did not consider filing a motion to declare G.S. 15A-2000 unconstitutional.

(b.b.) No motion was made calling for a probable cause hearing.

(c.c.) He did not consider a motion for a bill of particulars in order to find out about the aggravating circumstances the district attorney relied upon. He did not consider the use of a habeas corpus to get other evidence of the other four deaths. He did not ask for a list of the State's witnesses. He did not file a motion for speedy trial because he felt he was responsible for all of the delay and even at trial moved for one more continuance for Dr. Sainz to testify.

(d.d.) He did not file a challenge to the array. He did not file a motion in limine because he did not consider it appropriate. He did not file a motion to sequester the jury, nor any motion to ask the court to increase the number of peremptory challenges for the defendant. Regarding the Feratta decision, he did not feel that the defendant wanted to be co-counsel. He did not contact any organization to give him assistance at the trial, but did talk with other people for their thoughts and ideas, such as attorneys in Robeson County and Bladen County and with people in the clerk's office in Bladen County. He got a copy of the Jerry Paul jury selection transcript in a major case in Fayetteville. He got materials on capital cases from the North Carolina Trial Lawyers' Association.

(e.e.) He did not have the three psychiatrists testify in the penalty phase because he had already had them testify in the guilt phase. He knew that their testimony would be considered on all of the phases, and it didn't matter when they testified. He wanted the jury to know that the psychiatrists had placed a label on her condition, and by the evidence of problems to which the psychiatrists would testify he could build a psychiatric defense about drug abuse, and he thought he would be remiss if he did not use all three psychiatrists. He had enough trouble getting them to court to testify once.

(f.f.) He did not look at her file at the Southeastern General Hospital or at Dorothea Dix Hospital. He did not intend to call any other witnesses in the sentencing phase because he called the ones he did and the ones he wanted.

(g.g.) Mr. Jacobson's belief is that if Margie Bullard Barfield had followed his counseling, they would have gotten her off with a life sentence.

26. Dr. Arthur Eugene Douglas, a psychiatrist at the Southeastern General Hospital in Lumberton, North Carolina, testified as to his examination of the defendant, and the results of his evaluation in 1978. He discussed the records and sources available to him for background information and told of

his diagnostic opinion. He did not perform or cause any tests to be performed in his examination. He did confer with attorney Jacobson after his examination.

27. Dr. Bob Rollins, a medical expert in the field of forensic psychiatry, testified about his examination of the defendant at Dorothea Dix Hospital in Raleigh in 1978. He discussed the psychological tests given there, his own examination and feelings, the medication given to her while a patient, that she would not cooperate with him, and that he did not have any other evidence which would have been beneficial to the defendant in the sentencing phase. She had given him a statement of the events of the alleged crime which was not in his report, but which he felt he did not believe, and it would not be beneficial to the defendant to relate at court. The results of the Rorschach test given at Dix would indicate that the defendant would deal with tension by action, rather than reflection.

28. Jesse Bullard testified that he is a brother of the defendant and now lives in Bishopville, South Carolina. He was present at the trial of the case. He talked to attorney Jacobson at least once, and thinks it was over the telephone, and was present at the arraignment and talked to a number of the family who were then present. The attorney mentioned what his plans were at that time, but he cannot now recall them. He doesn't believe he saw the defendant in 1977 and early 1978. He discussed their family background through the early years and on up through the '70's, and that as he recalled, Thomas Burke, the defendant's first husband, had a problem with alcohol during his last three years.

29. Dr. Selwyn Rose, now of Winston-Salem, North Carolina, testified as an expert in the field of forensic psychiatry. He has been practicing medicine in the field of psychiatry since 1967. He is also a lawyer, licensed in California in 1974 and in North Carolina in 1980. Before coming to North Carolina, his practice was in Los Angeles, California. He moved to North Carolina in May 1978.

On September 13, 1980 he conducted his own evaluation concerning this case and made an examination of the defendant which lasted by interview for approximately 2-2½ hours. In the interview she admitted poisoning several people, whose names were given. He performed four psychological tests: Wechsler Adult Intelligence, Minnesota Multiphasic Personality Inventory, Rorschach and Bender-Gestalh.

After discussing his evaluation and findings, on direct examination Dr. Rose was asked this question: "Dr. Rose, do you have an opinion satisfactory to yourself as to whether Mrs. Barfield was sane or insane at the time of the commission of the murder of Stewart Taylor?" Answer: "My opinion is that she was not sane, in that I am uncertain as to whether she was sufficiently disturbed to reach the level of impairment which I consider to meet the insanity test." On cross-examination he was asked the following question by the district attorney: "Dr. Rose, you are not telling this court, are you, that based on a two hour interview with the defendant and your examination of testimony and files, that you have an opinion satisfactory to yourself to a reasonable certainty, scientific and medical certainty, that Margie Barfield at the time of the poisoning of Stewart Taylor understood the nature and consequences of her act and knew that it was wrong, you are not saying that, are you?" Answer: "No sir."

30. D. N. Geddie of Fayetteville testified that he had known the defendant for a number of years, that he was the manager of the Belk store in Tallywood Shopping Center in Fayetteville, had been with Belk's for 17 years, and that the defendant worked for Belk's for several years from 1964 until 1971.

31. Rev. Hugh E. Hoyle, pastor of Trinity Pentecostal Holiness Church of Blue Ridge Road in Raleigh, testified that he has been a minister for 18 years, has counseled people about their problems, and has counseled about drug problems and other matters. He first met this defendant in August 1977 in Woman's Prison. He has now been her pastor for over one year. (Defendant's counsel at this hearing said that the testimony of Rev.

Hoyle was a part of their showing under Lockett regarding community support.)

32. Mary Ann Tally testified that she is a licensed lawyer admitted to the North Carolina Bar in August 1974. She is the public defender for the 12th Judicial District. Following law school in 1974, she was first employed as an assistant public defender for the 12th Judicial District, and has been the public defender by appointment of the Governor since June 1976.

She has tried three capital cases that went to the jury on the question of life or death. She argued all three of them herself. Two of them were convicted, given the death penalty, and are now on death row; Steven Silhan and Norris Taylor. In the third case of James Alonzo Powell, the jury returned a recommendation of life imprisonment. Of her seven capital cases to which she was originally appointed, the families hired other counsel in the remaining cases.

She is opposed to capital punishment.

Mrs. Tally feels that the defendant, Barfield, did not have adequate representation at her trial.

In the opinon of Mrs. Tally, attorney Jacobson should have engaged in systematic motion practice, which he did not, and that there are about 12 motions that he should have made in order to have represented the defendant effectively. She discussed each of them. They are: He should have:

(1) Filed a motion to prohibit death qualification of potential jurors. This is one of the revolving issues across the country.

(2) Filed a motion for separate jury to determine guilt or innocence and death or life.

(3) Filed a motion to challenge the composition of the grand and petit jury.

(4) Filed a motion for the court to appoint an independent psychiatrist for the penalty phase.

(5) Filed a motion to grant him funds to employ a psychiatrist for the penalty phase who could talk to the jury about her problems and relate them to the mitigating factors.

(6) Requested any statements by the State's witnesses, specifically a "Hardy" motion, which he should have used for cross-examining

the State's witnesses.

(7) Filed a motion for a bill of particulars and required the State to set out the aggravating circumstances relied upon.

(8) Filed a motion to disclose all information relating to sentencing, including exculpatory and mitigating factors.

(9) Filed a motion to be allowed to have the defendant participate as co-counsel.

(10) Filed a motion to allow her a right of allocution, if his motion to have her appear as co-counsel was not granted.

(11) Filed a motion declaring G.S. 15A-2000 unconstitutional on its face and as it related to the facts of this case.

(12) Filed a motion for sequestration of the jury.

(13) Filed a motion in limine. After the call of the case for trial, he should have sought to restrict the use of the evidence concerning the other poison deaths. And he should have renewed his motion in limine for protection at every possible opportunity.

In the opinion of Mrs. Tally, Mr. Jacobson was ineffective in his handling of his motion to supress the confession.

In Mrs. Tally's opinion, Mr. Jacobson was ineffective in the handling his motion for change of venue from Scotland County to Bladen County.

In Mrs. Tally's opinion, Mr. Jacobson was ineffective in the handling of his motion for continuance because of the unavailability of Dr. Sainz to testify at trial.

In the opinion of Mrs. Tally, Mr. Jacobson was ineffective in failing to present evidence to support his various motions which were made, and that the lack of such, undercut on its face any effective presentation, and it wound up as being a presentation in a vacuum, and that he failed to make a proper showing that he was not competent to handle the case by himself when he appeared before either Judge McLean or Judge Hobgood.

She further testified that in her opinion the evidence presented by Mr. Jacobson during the penalty phase was very poorly handled; that essentially no evidence was brought out about her background and her humanness. That the

evidence presented at the penalty phase concerning her mental state was not effectively presented in any manner whatsoever. That no motions were made to the Court to request a new jury for punishment, and that it was absolutely essential to have been done in this case because of the way the motion to supress the confession had been handled. That because of his poor handling of motions practice, the jury had been tainted during the evidence presented in the first phase, and so were tainted in the second phase of the trial. That the evidence offered in the guilt phase was completely improperly handled for reason that he had called a number of doctors after a plea of not guilty by reason of insanity, after he knew that those doctors would say that she was sane, and that this gutted his defense completely. That in her opinion he failed to protect the rights of the defendant during the argument by the district attorney in the guilt phase. That in her opinion he should have requested several instructions by the judge to the jury; that he made no real effective argument regarding the defense of insanity; that he failed to request the judge for instructions that the presumption of premeditation and deliberation was not absolute; that he failed to request instructions and proper instructions for murder in the second degree and voluntary manslaughter; that he failed to handle himself properly on the instructions conference by failing to make a motion for a recorded conference, and by the subject matter he discussed in the conference; that he failed to request an instruction regarding a nonunanimous verdict in the punishment phase; that his argument to the jury during the penalty phase was poorly handled, and that he failed to make a cogent argument to the jury as to why they should return life instead of death; that in her opinion his conduct on the jury voir dire on the whole was very ineffectively handled; that in her opinion he did not provide the defendant with effective assistance of counsel.

In her opinion, if Mr. Jacobson had done all those things mentioned by her, she doesn't know that the results would have been any different, but at any rate, the defendant would have had a much better chance and would have had

a fair trial. Mrs. Tally did not do all of these things, motions and the like, in her Silhan case because each case is considered as an individual case. She cannot recall if she filed all of the 12 motions mentioned in the Silhan case, but she filed some of them, and all that she could dealing with that particular case. That she hopes she did her best in the Silhan case, and that Silhan went to death row. That in the Norris Taylor case she hopes she did all she could to save his life. He is now on death row. In her expert opinion, she disagrees with the statement in the reported decision by the North Carolina Supreme Court in this case, 298 NC 319, that Mr. Jacobson had rendered "high quality representation" to Mrs. Barfield. All that she had to work from is the testimony in the record of the original trial. She was not at the original trial. She has read the motions and orders of the court and the two volumes of the trial transcript.

33. Mr. John Ackerman testified that he lives in Houston, Texas and is the Dean of the National College of Criminal Defense. His law degree is from the University of Wyoming, and he was licensed there in 1967. For several years he practiced law in Wyoming, and organized the first public defender system in Wyoming.

His experience with capital cases is having had three cases which potentially involved capital punishment. One case resulted in the death sentence in Wyoming. On appeal he was able to get the Wyoming death penalty statute declared unconstitutional.

He is the editor of a publication started in September 1980 called Death Penalty Reporter. His college is now doing seminars on defending death penalty cases around the country. He was tendered, and held, to be an expert in criminal defense standards nationally. Subsequently, he was tendered, and held, to be an expert in the area of the evaluation of the competency of counsel in capital cases and an expert in the area of trial strategy and technique in criminal cases. No relevant opinion evidence came out as direct evidence. Many answers were given, which under the rules of evidence and the law, and the objections by the State, were recorded only for the record proper.

34. Horace Parnell testified that he has lived in Parkton and has known the defendant for 20 years or more. She moved into the community and married. Prior to 1969 when he first knew her, she was a very fine person and taught the Sunday School class. From 1969 to 1978 he did not see her too often during that period of time.

35. Nellie Wallace testified that she lives in Parkton and has been employed for a number of years with Belk's at Cross Creek Mall. She used to work at the Belk store in Tallywood from 1964 until 1975. She has known the defendant for 35 years and they worked together at Belk's. Their children visited in high school and up to about the year 1972. She did not volunteer to go to see Mr. Jacobson or any family member during the trial. She was never asked. She does not know what she would have done if she had been asked to be a witness in the original trial.

36. Dan Proctor testified that he is in the wholesale nursery business and lives in Parkton. He has known the defendant for 25 or 30 years. Mr. Jacobson never asked him to testify. He was available if he had been asked. During the 1960's his contact with the defendant was as any child in the neighborhood. He did not see her real often, but around town. She once lived across the street from him. His contact in the 1970's was like always, living across the street from her and in his area. They did not go to the same church. He saw her as any of his friends in Parkton. He did not notice any change in her while he knew her. In the 1970's she was always a fine person. He had no reason to make it known that he would testify.

37. Tommy Furmage testified that he is a farmer in the Parkton community and has known the defendant for 30-35 years. Mr. Jacobson never asked him to testify, but he was available to do so if asked. He thinks his wife is the only person that he told this to. It was general knowledge in his community that he would have testified if he had been asked. His contact with her in the 1960's was that he would see her at church and sometimes two or three times during the week in person. He always thought she

was a very nice person in his community.

38. James Teague testified that he lives in Fayetteville and works for Burlington Industries at its Raeford plant as supervisor of spinning. He knows the defendant and she worked under him in the late 1950's and early 1960's.

39. Wade Holder testified that he lives in Fayetteville and has known the defendant since 1953. When he was a teacher in the Parkton Public School System he lived with the defendant's parents for four years and that the defendant was in and out of the home three or four times a week. He never talked to Mr. Jacobson. He was available to testify if asked.

40. Linda Faye Paul testified that she lives in Charleston, South Carolina and is a sister of the defendant. When the witness was three years old, the defendant was married. She saw the defendant daily until the 1970's and considered the defendant a very good loving person, a dedicated mother and saw her relate to others. The only time she had any contact with attorney Jacobson was at the first hearing, in a small room where they were together with her sister, the defendant. She never spoke to the attorney directly and would not have known him unless he had been pointed out to her yesterday.

41. Cathy Anne Middendorf testified that she was a student at North Carolina State University and was a teaching assistant in social psychology. Defense counsel stated that they were not offering her as an expert. Not a scintilla of direct evidence was elicited from this witness relevant to any issue on trial in this case. This witness was excused by the defense counsel, to be allowed to be recalled at at a later time. This witness was subsequently discharged by the defense counsel without ever being returned to the witness stand. No evidence was ever elicited.

42. Dr. James Luginbuhl testified that he has a PhD in social psychology from the University of North Carolina. He is employed by North Carolina State as an associate professor of psychology. He is a member of

of numerous societies and has published numerous articles in the socio-psychology field. He was tendered, and held, to be an expert in the field of social psychology. Although he testified concerning research and his experience, there was no relevant direct evidence elicited in this case. Various questions and answers were recorded for the record proper only.

43. James O'Reilly testified that he is employed as a doctoral candidate in the field of sociology and demography, and has a Masters Degree in sociology from Duke University and lives in Durham. For four or five years he has been gathering and analyzing representation of various jury pools in North Carolina and elsewhere. He was tendered as an expert in jury study in North Carolina. The State objected and the Court sustained the objection. No relevant direct evidence was elicited from this witness.

44. Ronald Burke testified that he is the son of the defendant and lived with her growing up in the Parkton community. That his relationship with his mother was everything that you could ask for as a mother. That she saw to it that he and his sister attended church every Sunday and that she kept the family together. About 1967 his father began drinking and the atmosphere around the house was not good. There was a lot of fussing and arguing by the father. The father died in 1969. He went into the army in 1971 but received a hardship discharge in April 1973 in order to be at home with his mother. About six or seven months later, he left and was married. Thereafter his relationship was good but it was different, and he had a fight to help her get off excessive medication. He discussed the trial with the attorney, Mr. Jacobson, and first saw him at arraignment. Later he met him in his office. He was told of the charges and the consequences. The attorney asked him if there was anything he needed to know of his mother, that he said yes, and told him of her taking drugs excessively. The attorney never discussed the background of his mother prior to the time of taking drugs. He testified at the trial. He worked as hard as any family member with the attorney and attorney Jacobson complimented him several times

for his help. He testified on the hearing on the voir dire to supress the confession. He testified in the guilt or innocence phase. He testified in the punishment phase.

45. Kim Norton testified that she lives in Lumberton and that the defendant is her mother. Growing up they had the best mother and daughter relationship possible. The defendant was there supporting her in school functions and in church. There was a good marriage until 1967 when her father started drinking heavily and arguing. Her mother had worked at Burlington Mills in Raeford and Belk's in Tallywood. Later the witness moved to South Carolina. The witness had one child who was age three years at the time of trial. After she moved back to Parkton she had several arguments with her mother about taking pills and destroying herself. She was different in those later years, depressed and just changed a great deal, and was not the same person. She talked to attorney Jacobson at arraignment, and on Friday or Saturday before the trial and on Monday of trial. They discussed the defendant's drug problem. The attorney did not ask her about any background, other than the drug problem, or about any people in the Parkton community. That she has gone over her present testimony for this hearing a couple of times with present counsel. She was a witness in the guilt or innocence phase of the trial. That she testified that oridinarily she would not leave her daughter with her mother, the defendant, for that she was afraid.

46. Dr. Harmon L. Smith, Jr. of Durham testified that he is a professor at Duke University teaching in the field of ethics and moral philosophy. He was tendered, and held, to be an expert in the field of ethics. He talked to the defendant approximately one week ago today for a first time, and his purpose was that he wanted to interview her before testifying. That he was not with her long enough to establish firm conclusions, but he does have impressions from the interview. No relevant evidence was elicited on direct examination from this witness to any of the issues in the motion for appropriate relief. Various questions and answers appear only for the record proper.

47. James Alex Bullard testified that the defendant is his sister; that he is pastor of Mt. Calvary Baptist Church; that they had a close relationship growing up, and was together with her for 16 years. He was close as a brother and sister could get. He loved her more as they grew older. He knew her first husband, Thomas Burke, and in the early 1960's there was a close relationship because of the children. Later Mr. Burke drank, and died about 1968. In the 1970's he saw her approximately once a month. While she was in jail awaiting trial, he saw her two or three times and she seemed to be more like herself in the earlier years. He knew she was taking medication about the time of the incident which gave rise to this case.

48. Barry Nakell testified that he is a professor of law at the University of North Carolina School of Law, Chapel Hill. That he graduated from the University of Illinois School of Law in June 1966. That he served as law clerk to the former Chief Justice Roger Traynor of the California Supreme Court. In the academic year 1974-75 he was on leave of absence and worked as public defender in Washington, DC. He has published numerous legal articles; he has received a grant from the National Science Foundation, and in collaboration with others is in current research on the death penalty in North Carolina. His collected data concerns itself with homicides in North Carolina from June 1, 1977 through May 31, 1978. His purpose in gathering this data is to make a broad and deep study of homicide in North Carolina and to study the exercise of discretion in death penalty cases. His research is now well under way. He is subjecting it to computer analysis; and they will try to use an analysis that looks at multiple variables. Among his inquiries is to seek answers as to what motivates the death penalty decision. He hopes to have the analysis report complete and ready by the end of "next summer". No opinions or conclusions were offered by this witness. No direct evidence was obtained from this witness relating to this case.

49. At the completion of all oral testimony, the defendant offered

into evidence the following exhibits: #26, #27, #9, #12, #5, #6, #7, #8, #22, #10, #16, #14, #15, #25, #19, #18, #17, #11, #21, #29, #30. State's exhibit #1 was received into evidence at the outset without objection by either side.

50. Defendant's exhibit #20 had been marked for identification, but was not offered into evidence. However, after all of the evidence had been closed, and after all of the arguments had been closed, counsel for the defendant for a first time asked to introduce defendant's exhibit #20 into evidence. The State objected. The Court sustained the objection.

51. On the first day of the hearing, Mr. Little, counsel for the defendant, stated: "Your honor, I would ask the Court and the State's indulgence in one brief statement that I indicated to Mr. Jacobson that I was going to make at the beginning of his testimony, and that is, that we do not contend Mr. Jacobson is not a good attorney in general, and that he does not have a good reputation in this community as an attorney. Our sole source of inquiry is as to his effectiveness of counsel in this particular case and as to the allegations that were made in the motion for appropriate relief. Thank you, sir."

52. The defendant did not testify. She was personally present throughout the entire hearing.

After a consideration of all the competent evidence offered, and after having seen and observed all the witnesses on the stand, and after determining what weight and credibility to give to the testimony,

THE COURT CONCLUDES AS A MATTER OF LAW:

1. The principal challenge by defendant in this evidentiary hearing revolves basically around whether her counsel for the original trial and appellate review was competent. The charge is that defendant has been deprived of her right to effective assistance of counsel "because counsel . . . failed to provide her with representation within the range of competence demanded of defense attorneys in capital punishment prosecutions."

2. "The proper standard for determining the effectiveness of counsel" is stated in Marzullo v Maryland, 561 F. 2d 540, 543 (Court of Appeals 4th Circuit, 1957) as a question: "Was the defense counsel's representation within the range of competence demanded of attorneys in criminal cases?" "By this standard," the Court explained, "Effective representation is not the same as errorless representation. An attorney may make a decision or give advice which in hindsight proves wrong. Such errors . . . are not necessarily grounds for post-conviction relief." Marzullo, p. 544.

3. The burden of proof in a motion for appropriate relief is upon the defendant. To meet this burden "a convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from neglect or ignorance, rather than from informed professional deliberation." Marzullo, p. 544. The Court "measures an attorney's conduct by comparison with the competence generally found in the profession;" and it "requires an objective assessment of counsel's adequacy." Marzullo, p. 544. While the "standard does not list the things counsel should or should not do, it does not preclude resorting to specifics for acertaining the range of competence demanded." Marzullo, p. 544. It is generally required that an attorney:

(1) must be appointed promptly,

(2) have reasonable opportunity to prepare,

(3) must confer meaningfully with client,

(4) must conduct appropriate investigations, and

(5) must be allowed time for reflection and preparation for trial. (See Marzullo, p. 544.)

4. Monday morning's reflection by this Court of the events of the previous Friday, the last day of evidence and arguments, brings to mind certain matters which should serve to illustrate some of this Court's reasoning behind its ultimate results.

(a) After all the evidence had been closed, and after the "two" present counsel for the defendant had presented numerous exhibits into evidence, each exhibit having been marked earlier and used only for identification, and after all arguments for counsel had been heard and closed, and as the Court was about to recess over the weekend, for a first time counsel for the defendant moved to introduce defendant's exhibit #20 (a booklet on "How to Try a Capital Case") into direct evidence. The State objected. The Court sustained the objection. In effect, the Court did not use its discretion to allow defense counsel to reopen the case and present evidence.

Whether this omission was an oversight of counsel, or a strategy of counsel, is speculative. Ordinarily this Court would willingly treat it as an oversight. But calling it as an oversight only serves to demonstrate that even when a defendant has "two" attorneys instead of "one", there is no guarantee that all will be done for a client the first time around. The passage of time, and reflection, will indicate otherwise. A lawyer always can think of things he wished he had done for his client and case after the case is closed.

(b) On Friday, the last day of evidence, defense counsel offered Professor Barry Nakell of the School of Law of the University of North Carolina at Chapel Hill as a witness. Not a single competent relevant answer made it into direct evidence from this witness. The professor testified that the results of his analysis of certain data about the death penal and his own final conclusions about it, and his report about his ongoing

research, would not be ready until "next summer." (This hearing was from November 17-21, 1980.) If the "two" counsel for the defendant had talked to this witness beforehand (and it must be assumed that they did, because a part of the charge of ineffectiveness against original counsel is that he offered three psychiatrists to prove exactly opposite of the trial defense of not guilty by reason of insanity when he, by having their reports, must have known they would testify to the opposite;) they would have known that Professor Nakel was in no position to give any relevant direct evidence of results, conclusions and opinions from his research, and that he would not even reach them until the summer of 1981. There is no way the State in November 1980 could cross-examine about results and opinions that would not be finalized by the witness until "the summer" of 1981.

(c) Cathy Anne Middendorff was sworn as a witness by the defense. She did not give a scintilla of direct evidence. Though brought down subject to be recalled, she was never recalled and was excused in open court by the defense.

(d) Dr. Selwyn Rose can be said to have been offered by the present attorneys to show that Mr. Jacobson could have obtained from him evidence that the defendant was insane at the time of the commission of the offense. However, the answers as given, as recorded within the Judgment, do not measure up to the standard of newly discovered evidence. On the contrary, his answers seem to be in the same category as given by the original psychiatrists at original trial.

(e) Is the present Court to be charged with any specific responsibility to see that present counsel, privately obtained, makes no mistakes? Do these four illustrations indicate present counsel are incompetent, or that these "omissions" are "within the range of competence"? This Court feels that present counsel have given the defendant "high quality representation", and that these illustrations are not the result of any neglect or ignorance as mentioned in Marzullo. It is hindsight that says the several matters could have been handled differently.

5. There is no believable evidence to support the allegation in the motion for appropriate relief that the defendant was denied the effective assistance of counsel.

6. The defendant had a fair and impartial trial. None of her constitutional or other legal rights were denied or violated. The defendant has failed to carry her burden of proof.

7. The defendant is imprisoned by virtue of a legal and final judgment of a court of competent jurisdiction. She should be remanded to the custody of the North Carolina Department of Correction.

8. The defendant was represented by competent counsel, Robert D. Jacobson, who provided her with representation within the range of competence demanded of defense attorneys in capital punishment prosecutions.

9. Defendant's motion for a new trial on the sentencing phase, or phase two, is denied. The defendant's motion for a new trial on the guilt phase, or phase one, is denied. Defendant's motion to vacate and set aside the conviction and/or sentence is denied.

10. The numerous allegations, and evidence concerning the things Mr. Jacobson failed to do, or things he should have done, cannot be said to be so flagrant as to have resulted from neglect or ignorance, rather from informed professional deliberation. Objectively assessed, he was adequate.

11. There is no assurance that had Mr. Jacobson engaged in the type of systematic pretrial and trial motions practice suggested by any and all of the defendant's witnesses here, or that if he had engaged in a different part of them from which he did use, that the outcome of the trial would have been any different. So long as there are counsel in other capital cases who do use a systematic motions practice satisfactory to the case and themselves, and so long as good and competent counsel continue to have verdicts and sentences that result in the imposition of the death penalty in their cases, it remains speculative to say that a given pattern of motions will produce a favorable result to a defendant.

12. The decision of the North Carolina Supreme Court has become "the law of the case." State v Barfield, 298 NC 306 (1979). It is noted that the Supreme Court of Kentucky has said: "The doctrine 'law of the case' includes all errors relied on for reversal, whether mentioned in the Court's opinion or not, and all errors lurking in the record on first appeal, which might have been, but were not expressly relied on." Cited in Black's Law Dictionary, Revised 4th Edition, Page 1030.

Although present counsel contend that even though "the law of the case" applies, the original counsel was ineffective within the range of his competence for that he should have done the challenged things, and that he failed to perform. However, there is no absolute duty of original counsel to have done all, or a combination of all, the things contended by present counsel, and the law of the case still applies.

A post-conviction hearing is no substitute for an appeal. Post-conviction cannot be used to "reassert" identical assignments of error raised on appeal.

13. The Supreme Court of North Carolina on direct review of this case said at page 319:

> "Though Mr. Jacobson carried a great burden in representing the defendant in a capital case, we do not find it to have been so disproportionate to that borne in the usual course of criminal defense work so as to have required the court to have appointed another attorney to provide assistance. We would add, parenthetically, that Judge McLean's order reflects favorably upon Mr. Jacobson's professional background and experience, indicating that he was competent to represent the best interests of the defendant. It is our opinion that Mr. Jacobson gave defendant high quality representation."

14. The evidence about the four other deaths by poisoning was properly admitted under the rules of law and evidence as have been accepted and interpreted by the North Carolina Supreme Court.

15. The whole of the trial judge's charge, both in the guilt phase and the penalty phase, were in the record on appeal to the Supreme Court. That Court gave those instructions a close scrutiny. If there was legal error within any of the instructions as given, the Supreme Court would have said so. To the contrary, it found no error. It "combed the record."

Mr. Jacobson had no duty to request the jury instructions, or legal theories of the law as instructions, as alleged by present counsel. The trial judge gave valid lawful and constitutionally proper instructions to the jury in each phase of the trial.

16. It is not constitutional error for the trial judge to refuse to advise the jurors in a capital case of the consequences of their failure to reach a nonunanimous verdict as to the sentence recommendation.

17. The statute, N.C.G.S. 15A-2000 et. seq., and all of its parts have been held to be constitutional by the North Carolina Supreme Court. This Court, having examined all of the contentions of the defendant, concludes that North Carolina's death penalty statute is constitutional and survives the specific challenge made herein.

18. The Supreme Court of North Carolina fulfilled its statutory duties in this case, as required by N.C.G.S. 15A-2000 et. seq., 298 NC 306.

19. There is no "newly discovered evidence."

20. The fact that present counsel have shown that different or additional evidence could have been presented at the original trial, if Mr. Jacobson had asked for background and other information properly, or if he had investigated properly, does not prove, on this record, ineffectiveness of counsel, or rise to be newly discovered evidence.

21. This Court has read the transcript of the original trial, has carefully reviewed each of the allegations raised in the motion for appropriate relief, has carefully read all briefs of counsel, and other legal citations, and now feels it would serve no useful purpose to try and write a specific response herein to each contention raised in the motion for appropriate relief, and believes that the conclusions herein stated conform to the law in support of its ultimate decision.

22. Parenthetically, and on further reflection, it is noted that on Sunday, November 16, 1980, the Pittsburg Steelers and the Cleveland Browns

played a football game that went down to the last six seconds before victory for the Steelers. With three minutes left in the game, twice the Steelers failed to score from within inches away of the goal line. Passes were dropped, and the fullback couldn't run it over. Terry Bradshaw is as good a professional quarterback as can be found in the business. Yet, he could not achieve a score for his team with only inches to go for a touchdown. In the waning moments, with six seconds left, a second chance came when Bradshaw threw what proved to be the winning touchdown pass, as he found Swann free in the end zone.

The living room quarterbacks, the Monday morning quarterbacks, and the T.V. announcers, during those last three minutes were saying that the World Champion Steelers blew it; meaning that they did not take advantage of their opportunities, or perform as professionals, and that they "failed to play within the range of their competence." It is interesting to note that while passes had been dropped earlier, in the last six seconds it was a pass play which won the game.

While football and a person's life are not to be equated in value, the perfect game in sports or life is yet to be played. Success --- and failure --- always look different in hindsight.

Now, therefore, IT IS ORDERED that:

1. The defendant, Margie Bullard Barfield, had a fair and impartial trial and appellate review; and none of her constitutional or legal rights were denied or violated.

2. The motion for appropriate relief is denied and dismissed.

3. The judgment and sentence of the Court entered in this case is legal, valid and proper, and was entered in full compliance with due process of law.

4. The sentence imposed is authorized by law.

5. The petitioner is remanded forthwith to the custody of the North Carolina Department of Correction.

6. The stay of execution issued by this trial court on October 9, 1980 is hereby dissolved. Considering the provisions of N.C.G.S. 15-194, it is ORDERED that a new date for execution is set as the third Friday from entry of this Order, to-wit: on December 12, 1980.

7. One copy of this Judgment shall be forwarded by the Clerk of Superior Court of Robeson County to each of the following persons: Margie Bullard Barfield, North Carolina Department of Correction, Women's Division, 1022 Bragg Street, Raleigh, NC 27603; James D. Little, Attorney at Law, 310 Dick Street, Fayetteville, NC 28103; Richard H. Burr, III, Southern Prisoners Defense Committee, Box 120636-Acklen Station, Nashville, TN 37212; Joe Freeman Britt, District Attorney, 16th Judicial District, Robeson County Courthouse, Lumberton, NC 28358; Donald W. Stephens, Assistant Attorney General, State of North Carolina, Justice Building Raleigh, NC 27602; and the Secretary of the Department of Correction, Raleigh, NC 27603.

This the 26th day of November 1980.

E. Maurice Braswell

E. MAURICE BRASWELL
- JUDGE PRESIDING -

NO. 69 SIXTEENTH DISTRICT

ROBESON COUNTY

SUPREME COURT OF NORTH CAROLINA

Spring Term 1981

* * * * * * * * * * * * * * * * * *

STATE OF NORTH CAROLINA)
)
v) ORDER
)
MARGIE BULLARD BARFIELD)

* * * * * * * * * * * * * * * * * *

On 2 December 1980 defendant filed with this Court a Petition for a Writ of Supersedeas pending our consideration of her Petition for a Writ of Certiorari. The defendant's Petition for Writ of Supersedeas was allowed by the Court in conference on 6 January 1981.

The Court has today considered and does hereby deny defendant's Petition for Writ of Certiorari.

It is, therefore, ordered that the Writ of Supersedeas entered by Carlton, J., on 6 January 1981 be and the same is hereby dissolved and terminated.

The Warden of Central Prison will proceed as by law provided, and a copy of this order will be certified forthwith to the following persons:

Governor James B. Hunt, Jr., Raleigh, N. C.
Richard L. Griffin, Assistant Attorney General
Robert D. Jacobson, Attorney at Law, Lumberton, N. C.
Joe Freeman Britt, District Attorney, Lumberton, N. C.
Lee J. Greer, District Attorney, Whiteville, N. C.
Clerk of the Superior Court, Bladen County,
Elizabethtown, N. C.
Warden of Central Prison, Raleigh, N. C.

BY ORDER OF THE COURT IN CONFERENCE, this 8th day of July, 1981.

Meyer, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 9th day of July, 1981.

A TRUE COPY
J. GREGORY WALLACE
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
BY Sharon Pennington
DEPUTY CLERK
July 15 19 81

J. Gregory Wallace
J. GREGORY WALLACE
Clerk of the Supreme Court of
North Carolina

Margie Bullard BARFIELD, Petitioner,

v.

Kenneth W. HARRIS, et al., Respondents.

No. 82-245-HC.

United States District Court, E. D. North Carolina, Raleigh Division.

May 21, 1982.

Habeas corpus petition was filed by petitioner who had been convicted of first-degree murder by poisoning, and sentenced to death. The District Court, Dupree, Chief Judge, held that: (1) petitioner failed to establish that her trial counsel was ineffective; (2) petitioner was not entitled to relief on the ground that her jury was culled of all those who revealed, during voir dire examination, that they had conscientious scruples or were otherwise against capital punishment; (3) trial court's submission of evidence tending to show that petitioner was responsible for the poisoning death of four other individuals, not including the murder for which she was convicted, did not introduce an impermissibly arbitrary and unreliable element into the determination of guilt; (4) trial court's admission of the other murders evidence as relevant to aggravating circumstances during the sentencing phase of trial was proper; (5) evidence supported trial court's submission of the "especially heinous, atrocious, or cruel" aggravating circumstance during the sentencing phase of trial; and (6) petitioner failed to establish that her death sentence was disproportionate as compared with other death penalty and first-degree murder cases.

Petition dismissed.

1. Habeas Corpus ⇐25.1(1)

Habeas court was not barred from considering certain of petitioner's claims because of petitioner's procedural default in the state courts, where the state had not enforced the default.

2. Criminal Law ⇐641.13(4)

Acts and omissions of defense counsel in a criminal case are to be judged by the "range of competence" standard, which asks whether defense counsel's representation was within the range of competence demanded of attorneys in criminal cases.

3. Habeas Corpus ⇐25.1(6)

Habeas petitioner's trial counsel's failure to continue to shop around to locate a

psychiatrist who would testify that petitioner was insane, after he already had the opinions of three psychiatrists that she was sane, did not constitute ineffective assistance of counsel.

4. Habeas Corpus ⇐85.5(11)

Habeas petitioner failed to establish that her trial counsel was ineffective in not calling additional character witnesses.

5. Criminal Law ⇐641.13(2)

Where there is no reason to believe that a particular motion, if made, would have been granted, failure to make the motion does not constitute ineffective assistance of counsel.

6. Habeas Corpus ⇐25.1(6)

Habeas petitioner's trial counsel's failure to file various additional pretrial motions did not constitute ineffective assistance of counsel, where there was nothing in the record to indicate that such motions, if made, would have been sustained or that the failure of the trial court to sustain such motions would have resulted in reversible error on appeal.

7. Habeas Corpus ⇐85.5(11)

Habeas petitioner failed to establish that her trial counsel was ineffective in his arguments to the jury.

8. Criminal Law ⇐829(1)

A requested instruction which correctly states the law and is related to facts received in evidence should ordinarily be given, but where the subject matter of the requested instruction has been otherwise covered in the charge, the failure to give it in the exact language requested is not error.

9. Criminal Law ⇐920

Defense counsel's mistakes in judgment or even failure to recognize and investigate certain defenses does not necessitate a new trial.

10. Criminal Law ⇐641.13(4)

Court should not measure the competency of defense counsel's advice by retrospectively considering whether it was right or wrong, but should confine its inquiry to the question of whether defense counsel's representation was within the range of competence demanded of attorneys in criminal cases.

11. Habeas Corpus ⇐25.1(4)

Habeas corpus petitioner, who had been convicted of first-degree murder by poisoning and sentenced to death, was not entitled to relief on the ground that her jury was culled of all those who revealed during voir dire examination that they had conscientious scruples or were otherwise against capital punishment. N.C.G.S. § 15A-2000(b).

12. Criminal Law ⇐1166.17

Exclusion of even one prospective juror, who did not state unequivocally that he could not vote for the death penalty under any circumstances, invalidates a subsequent sentence of death, regardless of whether the State went to trial with peremptory challenges unexercised. N.C.G.S. § 15A-2000(b).

13. Jury ⇐108

Trial court's exclusion of prospective juror, who stated several times that under no circumstances could he vote to recommend the death sentence, was proper, even though the prospective juror had equivocated during voir dire. N.C.G.S. § 15A-2000(b).

14. Habeas Corpus ⇐45.2(4)

Habeas court may not grant relief to a state prisoner on the basis of ordinary errors; rather, the test is one of fundamental fairness; the error must be so egregious as to amount to a denial of constitutional due process. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amends. 5, 14.

15. Habeas Corpus ⇐30(1)

Only errors that are so fundamental that they affect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained should entitle a petitioner to habeas relief. 28 U.S.C.A. § 2254.

16. Habeas Corpus ⇐25.1(8)

Trial court's admission of evidence tending to show that habeas petitioner was responsible for the poisoning death of some four other individuals, including the murder of which she was convicted, did not introduce an impermissibly arbitrary and unreliable element into the determination of guilt.

17. Criminal Law ⇐986.6(3)

Trial court's admission of evidence of other murders as relevant to aggravating the circumstances during the sentencing phase of capital case was proper, where evidence of such murders had been presented during the guilt phase. N.C.G.S. § 15A-2000(a)(3), (e)(11).

18. Homicide ⇐311

Trial court's submission of "pecuniary gain" and "hindering the enforcement of the laws" as aggravating circumstances during sentencing phase of capital murder case could not result in the arbitrary compounding of aggravating factors, where the evidence supported each submission. N.C.G.S. § 15A-2000(b), (e)(6, 7).

19. Homicide ⇐311

Evidence depicting the slow and agonizing death of habeas petitioner's poisoning victim supported trial court's submission of the "especially heinous, atrocious, or cruel" aggravating circumstance during the sentence phase of capital case. N.C.G.S. § 15A-2000(b).

20. Criminal Law ⇐1208(1)

In the sentencing phase of a capital case, the jury must be permitted to consider any and all possible mitigating factors. N.C.G.S. § 15A-2000(b).

21. Criminal Law ⇐824(1)

When counsel makes no request for additional mitigating circumstances instructions in the sentencing phase of a capital case, failure of the trial court to mention any particular items as a possible mitigating factor will not be held for error so long as the trial court instructed that the jury may consider any circumstance which it finds to have mitigating value. N.C.G.S. § 15A-2000(f)(9).

22. Criminal Law ⇐796

Under North Carolina law, the trial court in the sentencing phase of a capital case has no obligation specifically to instruct on nonstatutory mitigating circumstances which are not called to its attention. N.C.G.S. § 15A-2000(b).

23. Criminal Law ⇐1208(1)

Death sentence was not rendered invalid by trial court's failure to elaborate various plausible nonstatutory mitigating circumstances, where the jury was not precluded from considering nonstatutory mitigating factors. N.C.G.S. § 15A-2000(b).

24. Criminal Law ⇐796

Trial court did not commit fatal error in the sentencing phase of capital case by failing to specifically instruct that the burden of proof on mitigating circumstances was by preponderance of the evidence, where trial court did instruct the jury that the burden was not beyond a reasonable doubt and indicated that mitigating circumstances would be present if the jury merely found them to exist from the evidence. N.C.G.S. § 15A-2000(b).

25. Criminal Law ⇐790

Under North Carolina law, trial court is not permitted to instruct the jury as to effect of their failure to reach a unanimous verdict in the sentencing phase of a capital case. N.C.G.S. § 15A-2000(b).

26. Habeas Corpus ⇐30(3)

Habeas petitioner failed to establish that her death sentence was disproportionate as compared with other death penalty and first-degree murder cases in state. N.C.G.S. § 15A-2000(d)(2).

27. Criminal Law ⇐1206(1)

Absent any factual proof of arbitrary administration, North Carolina death penalty was not unconstitutional. N.C.G.S. § 15A-2000(b).

James D. Little, Singleton, Murray, Harlow & Little, Fayetteville, N. C., Richard H.

Burr, III, Southern Prisoners' Defense Committee, Nashville, Tenn., for petitioner.

Richard N. League, Sp. Deputy Atty. Gen., Raleigh, N. C., for respondents.

MEMORANDUM OF DECISION AND ORDER

DUPREE, Chief Judge.

Petitioner, Margie Bullard Barfield, frequently referred to in these proceedings as Velma Barfield, was convicted in the Superior Court of Bladen County, North Carolina, on 2 December 1978 of first-degree murder by poisoning of one Stewart Taylor. At the sentencing phase of the trial the jury having found three aggravating circumstances attending the murder and no mitigating circumstances, judgment of death by execution was pronounced as mandated by North Carolina law.

On November 6, 1979, the Supreme Court of North Carolina affirmed this judgment, *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979). Following denial by the Supreme Court of the United States of her petition for certiorari on June 30, 1980, *Barfield v. North Carolina*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137, and her petition for rehearing on September 17, 1980, *id.* at 918, 101 S.Ct. at 41, 65 L.Ed.2d at 1181 Barfield's execution date was set for October 17, 1980.

Pursuant to a motion for post-conviction relief filed by Barfield in the state court on October 3, 1980, a stay of execution was entered pending a full-blown evidentiary hearing which was conducted by the Honorable E. Maurice Braswell, Judge of the Superior Court, during the week of November 17, 1980. In a thirty-seven-page judgment containing plenary findings of fact and conclusions Judge Braswell denied Barfield's motion for post-conviction relief on 26 November 1980. The Supreme Court of North Carolina declined to review this judgment by denying Barfield's petition for a writ of certiorari, and thereafter certiorari as to the state post-conviction proceedings was also denied by the United States Supreme Court on October 19, 1981. *Barfield v. North Carolina*, 454 U.S. 957, 102 S.Ct. 494, 70 L.Ed.2d 261 *rehearing denied*, —— U.S. ——, 102 S.Ct. 693, 70 L.Ed.2d 655 (1981).

Again condemned to die during the week of March 15, 1982, Barfield filed her petition for habeas corpus in this court on March 9, 1982 pursuant to 28 U.S.C. § 2254 alleging numerous constitutional infirmities in her trial and conviction in 1978. Pending hearing on the petition this court issued a stay of execution which remains in effect. The hearing was held on March 26, 1982, and in this memorandum of decision the court will record its findings and conclusions.

As indicated above the week-long hearing which was held on Barfield's motion for post-conviction relief in the state court resulted in exhaustive findings and conclusions by the presiding judge, and all parties here are agreed that Barfield has exhausted all of her state remedies prior to invoking the jurisdiction of this court. The parties have also agreed that this court might consider the voluminous records compiled in the trial and post-conviction proceedings in the state court and it has been stipulated that this court might consider all of the testimony offered by petitioner in the state post-conviction proceedings and excluded on objection by the state. The court has done this, and the parties have further agreed that this obviates the necessity for any further evidentiary hearing in this court.

Counsel for petitioner were invited to identify any factual findings of Judge Braswell in the state court post-conviction proceedings which were claimed not to be supported by the evidence adduced at that hearing. They have been unable to do so in any material respect, and this court's own review of the more than 2,000 pages of testimony considered by Judge Braswell has persuaded this court that the merits of the factual dispute were fully resolved in the state court proceedings; that the factfinding procedure there employed was adequate to afford a full and fair hearing; that all material facts were adequately developed; that the court had jurisdiction of the sub-

ject matter; that petitioner was represented by exceptionally able counsel at all stages of the post-conviction proceedings; that she received a full, fair and adequate hearing; and that she was not otherwise denied due process of law in that proceeding. Accordingly, this court, as required by 28 U.S.C. § 2254(d), presumes Judge Braswell's findings to be correct and adopts them as its own.[1] *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

[1] One additional threshold matter is respondents' contention that this court is barred from considering certain of petitioner's claims because of petitioner's procedural default in the state courts. *See Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir.), *cert. denied*, 449 U.S. 1004, 101 S.Ct. 545, 66 L.Ed.2d 301 (1980). All issues raised here, however, were considered either by the North Carolina Supreme Court on direct appeal or by Judge Braswell on the motion for appropriate relief, and neither court relied on any procedural default to bar consideration of any issue raised. Instead, the Supreme Court "combed the record" and considered all issues raised in addition to certain issues not brought forward on appeal. *State v. Barfield, supra*, 298 N.C. at 354–355, 259 S.E.2d at 544. Judge Braswell considered each of petitioner's contentions and concluded that none of them had merit. Where the state has not enforced any default, the federal court is not barred from consideration of the issue. *Engle v. Isaac, supra*, — U.S. at — n.44, 102 S.Ct. at 1575 n.44; *County Court of Ulster County v. Allen*, 442 U.S. 140, 147–154, 99 S.Ct. 2213, 2219–23, 60 L.Ed.2d 777 (1979). *Cf., Gardner v. Florida*, 430 U.S. 349, 351, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977).

We turn, then, to the grounds which petitioner claims warrant habeas relief in this court. Of the numerous alleged constitutional deficiencies in her trial and conviction those meriting serious consideration will be addressed under the several headings to follow.

INEFFECTIVENESS OF COUNSEL

Following her indictment on the murder charge petitioner was found to be indigent, and Attorney Robert D. Jacobson of the Robeson County, North Carolina, bar was appointed to represent her. When it became known to Mr. Jacobson that petitioner was suspected of having committed at least four other murders by poisoning in addition to the one for which she was indicted, he moved the court for the appointment of additional counsel to assist him in representing petitioner. This motion was denied, and Mr. Jacobson continued to represent petitioner throughout the trial and the appeals.[2] In the post-conviction proceedings

1. As noted above, the court has carefully considered all testimony offered in the state post-conviction proceedings, including a large amount heard but not considered by Judge Braswell. The parties appear to agree that by so doing, the court has cured any deficiency there may have been in the state court hearing. The testimony excluded there was expert opinion on the question of counsel's effectiveness rather than evidence of any underlying historical facts. *See, e.g., Washington v. Watkins*, 655 F.2d 1346, 1354 (5th Cir. 1981). Therefore, the exclusion of testimony did not materially affect Judge Braswell's findings of fact, although it may have affected his "evaluation based on those subsidiary findings ... determining whether counsel's representation satisfied the qualitative, normative standards dictated by the Sixth and Fourteenth Amendments to the Constitution." *Id.* The state court's exclusion of testimony, whether right or wrong, in no way debilitated its determination of basic historical facts, which were almost entirely undisputed.

2. In rejecting an exception based on the failure of the trial court to grant the motion for additional counsel the Supreme Court of North Carolina said:

"Though Mr. Jacobson carried a great burden in representing the defendant in a capital case, we do not find it to have been so disproportionate to that borne in the usual course of criminal defense work so as to have required the court to have appointed another attorney to provide assistance. We would add, parenthetically, that Judge McLean's order reflects favorably upon Mr. Jacobson's

petitioner has been represented by Mr. James D. Little of the Fayetteville, North Carolina bar and Mr. Richard H. Burr, III, of the Southern Prisoners' Defense Committee, Nashville, Tennessee.

Petitioner alleges that her former counsel, Mr. Jacobson, ineffectively represented her in six major areas:

1. The investigation and presentation of psychiatric evidence in both phases of her trial.

2. The investigation and presentation of general testimony in mitigation of punishment.

3. The handling of various critical pretrial motions.

4. The presentation of argument to the jury on her behalf.

5. The making of requests for specific instructions to the jury that were critical to her case.

6. The presentation and development of issues on the direct appeal of her case.

[2] Counsel for both parties have recognized in all of the post-conviction proceedings that the acts and omissions of defense counsel in a criminal case are to be judged by the "range of competence" standard established in *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978). Judge Braswell also applied this standard in the state post-conviction proceedings. In *Marzullo* the Fourth Circuit expressly disavowed the "farce and mockery of justice test" which had previously been approved in this circuit and adopted the standard established in *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), which involves the answer to this inquiry: "Was the defense counsel's representation within the range of competence demanded of attorneys in criminal cases?" Reference was made to the earlier Fourth Circuit case of *Coles v. Peyton*, 389 F.2d 224 (1968), where the principles for judging competency of criminal defense counsel as taken from previous cases were listed as follows:

1. Counsel for an indigent defendant should be appointed promptly.

2. Counsel should be afforded a reasonable opportunity to prepare to defend an accused.

3. Counsel must confer with his client without undue delay and as often as necessary to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable.

4. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

In *Coles* the court stated further that the failure to conform to these requirements would constitute a denial of effective representation of counsel "unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby."

In *Marzullo*, however, the court went on to say:

> "By this [range of competence] standard, effective representation is not the same as errorless representation. An attorney may make a decision or give advice which in hindsight proves wrong. Such errors, as *McMann* pointed out, are not necessarily grounds for post-conviction relief.... A convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation." (Footnotes omitted.) 561 F.2d at p. 544.

The performance of Attorney Jacobson in each of the major areas of complaint will

professional background and experience, indicating that he was competent to represent the best interests of the defendant. It is our opinion that Mr. Jacobson gave defendant high quality representation." *State v. Bar-*

now be reviewed in the light of the principles enunciated in these cases.[3]

1. *Failure to Investigate and Present Psychiatric Evidence.*

Shortly after she was apprehended the petitioner made a full confession that she had administered the poison which resulted in the death of Stewart Taylor, but she maintained that she had no intention of killing him. The likelihood that she would be able to convince any court that she had no such intention was sharply diminished, however, when she also confessed to administering poison to four other people including a former husband and her own mother, as a result of which each of them had died. Under these circumstances the defense which readily suggested itself to defense counsel was that of insanity, and Attorney Jacobson determined early on that he would undertake to establish such defense. Petitioner had been under the care of her own psychiatrist, a Dr. Sainz, for some time prior to the offense with which she was charged, and Jacobson was able to obtain the court's authorization to have her examined by two additional psychiatrists. Unfortunately, the consensus of opinion of these three physicians was that petitioner was legally sane at the time of the offense, that is, that she was able to know and understand the nature of her act and its consequences and that at the time of the trial she was able to consult with her counsel and assist in her own defense. Faced with this knowledge the defense attorney decided to employ another tack: he would show by these three physicians and others that petitioner had a long history of drug abuse and was suffering from a variety of psychopathic disorders which would negative the essential element of intent thus reducing the offense to second-degree murder and that in any event the evidence could be shown as an extenuating or mitigating circumstance to be considered at the sentencing stage in the event that petitioner should be convicted of first-degree murder.

This course of action, so petitioner's present counsel contend, was woefully ineffective and fell far short of measuring up to the standard required by *Marzullo*. In support of their position counsel were able to produce at the state post-conviction proceedings Dr. Selwyn Rose of Winston-Salem, North Carolina, an admitted expert in forensic psychiatry, who testified that in his opinion petitioner was not sane at the time of Stewart Taylor's murder, "in that I am uncertain as to whether she was sufficiently disturbed to reach the level of impairment which I consider to meet the insanity test." He testified further that petitioner "has three types of severe psychopathology, psychiatric illness, emotional illness. She has a history well documented of depression diagnosed as endogenous depression, which means from within, suggesting biochemical or organic causes, and that depression has included suicide attempts, overdose . . . ."; that petitioner had a history of drug abuse; that "the depression itself can certainly impair thought processes and rational thinking; " and "of the diagnostic identities that I mentioned, drug abuse, depression and character structure or personality defects . . . can at times impair judgment, insight . . . control of one's behavior and conduct" and that in his opinion "she was impaired by those three types of psychopathology at the time of the offense." Thus Dr. Rose found that petitioner's sanity at the time of the offense was at least questionable and that her ability to control or conform her

field, 298 N.C. 306, 319, 259 S.E.2d 510, 524 (1979).

3. Although the death penalty is constitutionally different from other forms of punishment, *e.g.*, *Beck v. Alabama*, 447 U.S. 625, 637, 100 S.Ct. 2382, 2388, 65 L.Ed.2d 392 (1980), the standard for measuring the competence of counsel does not vary. Rather, the fact that a defendant risks the death penalty is one fact among many relevant to the evaluation of whether counsel's representation was within the ordinary range of competence. *See Washington v. Watkins*, 655 F.2d 1346, 1356–1357 (5th Cir. 1981) (rejecting "strict scrutiny" of counsel's performance in a capital case). This, however, in no way means that the court has not given full and careful consideration to each of the asserted inadequacies in counsel's performance.

behavior according to the requirements of law was impaired. Motion for Appropriate Relief (MAR) Transcript at 298–311.

Relating the availability of such testimony to the ineffectiveness of counsel claim petitioner produced as witnesses a North Carolina attorney, Mary Ann Tally, who qualified as an expert in criminal defense based on seven years' experience in a public defender's office, and John Ackerman, who had had seven years' experience as the dean of the National College for Criminal Defense in Houston, Texas, who was permitted to testify as an expert in criminal defense standards. Mr. Ackerman testified that:

> "I think a lawyer to properly handle a psychiatric defense must become quite familiar with psychiatry, what it is, how it is practiced, the terms, the various mental illnesses, what their manifestations are. Sometimes it is a lot of work. You have to go around and seek out a psychiatrist who will hear what you are saying, who will understand your client, and *we all know that to some extent psychiatric defenses involves some shopping.* You might just find a psychiatrist who has spent a great deal of time dealing with questions like drug induced psychosis, for instance, which is a possibility here, who would have some greater familiarity with that field than any other psychiatrist in this area. MAR Transcript at 412. (Emphasis supplied.)

Building on this argument, counsel for petitioner have argued in their brief that:

> "Various experts have various areas of expertise, and it is the duty of counsel to pursue all available avenues until he finds the expert who can evaluate his client fairly, completely, and truthfully." [4]

In short, petitioner now takes the position that it was the duty of Mr. Jacobson to keep on "shopping" until he found a psychiatrist who would testify that his client was insane. While this court readily recognizes that in this day and age the chances of finding an "expert" who will testify on any side of a given proposition are reasonably good, the necessity of reputable and competent counsel's doing so under the circumstances here involved is not perceived.[5]

Moreover, good trial tactics may have dictated exactly the contrary course. Assume for the moment that Jacobson had undertaken to "shop" for an expert and had been lucky enough to come across Dr. Rose. He would then have been faced with the difficult decision of whether or not to use his own psychiatrist, Dr. Sainz. If he did and the testimony of the two experts developed to be contradictory, it would have been very damaging. If he failed to use Dr. Sainz and the other two court-appointed psychiatrists, the state doubtless would have used them in rebuttal, and the result probably would have been even more devastating.

Under somewhat similar circumstances in which trial counsel was charged with having been ineffective in not locating and presenting an expert witness who would have contradicted much of the testimony of the prosecution's expert the Eighth Circuit said in *Knott v. Mabry*, *supra*:

> "Although petitioner's trial counsel probably should have increased his knowledge of the relevant scientific techniques

4. Cases cited in support of this proposition such as *Proffitt v. United States*, 582 F.2d 884 (4th Cir. 1978), and *United States v. Fessel*, 531 F.2d 1278 (5th Cir. 1976), are inapposite here. Those cases involved the failure of defense counsel charged with notice of their client's mental problems to move for the appointment of psychiatric experts under 18 U.S.C. § 3006A(e). Here defense counsel not only moved for and obtained the appointment of two competent psychiatrists under state law but he also had the benefit of petitioner's own psychiatrist, Dr. Sainz, under whose care petitioner had been for some time.

5. "Of course, each case must be evaluated individually. Serious dereliction in counsel's representation might well be established where material witnesses are not called to testify .... For example, if an expert witness could readily verify that 'blood' was actually 'paint,' counsel might be deficient in failing to pursue such a witness.... Unfortunately, in today's technological society, experts generally can be found to render 'scientific' opinions on either side of any question." *Knott v. Mabry*, 671 F.2d 1208, 1212 (8th Cir. 1982).

and principles by consulting an expert such as Irving Stone or by studying literature in the field, we have difficulty in light of the existing record holding that counsel's representation was constitutionally inadequate. Human nature is such that most people think they have a better understanding of the demands of an event after it has happened. Trial of law suits is peculiarly susceptible to hindsight appraisal of another lawyer's endeavors. When trial counsel exercise their judgment in making strategic decisions, third party post-trial construction of strategic alternatives cannot be the sole basis for finding constitutional deficiency." *Id.* at p. 1212.

[3] And so it is here. Although he consulted with a relative who was a psychiatrist and had the benefit of consultation with each of the three psychiatrists who testified at the trial, Mr. Jacobson probably could have increased his knowledge in the field of psychiatry, and certainly had he shopped long enough he could have located an expert who could have testified as to the petitioner's sanity in a manner even more unequivocal than did Dr. Rose at the post-conviction hearing. That he did not do so cannot in view of the record in this case be held to have been constitutionally inadequate.

2. *Failure to Develop General Mitigating Evidence.*

Petitioner's principal cause for complaint as to trial counsel's performance in this regard was his failure to call character witnesses

"[T]here were numerous witnesses available to testify at her original trial who would have been able and willing to give a variety of testimony concerning the good character of Ms. Barfield and the tremendous difficulty she experienced which led her to abuse drugs substantially. Through this testimony, the individuality and humanness of Ms. Barfield would have been presented to the jury." Petitioner's Brief, p. 20.

Testimony as to the character of an accused is normally designed to serve two purposes: first, on the question of guilt where commission of the offense is denied by the accused testimony as to his good character may be introduced to show the unlikelihood that a person with a good character would have committed the offense in question. Where the accused takes the stand and testifies a second purpose of character testimony may be to bolster the credibility of the accused as a witness. In addition, in a capital sentencing proceeding character evidence may be offered in hope of lending a convicted murderer some degree of "humanness." In the case at bar no amount of character testimony would have served the first purpose, for there was never any question that the petitioner committed the offense. And as to the matter of enhancing her credibility on the critical question of intent it seems highly unlikely that any number of character witnesses could have overcome the overwhelming evidence of intent which was provided by the properly admitted evidence of the four other murders which petitioner had committed by poisoning.

And here again sound trial tactics may have dictated limited use of character witnesses. Such witnesses would have been subject to cross-examination with the attendant risk that damaging evidence including a rehash of the other four murders might have been brought out thereby destroying any credibility and "humanness" which the jury may have ascribed to the petitioner after hearing her own testimony and observing her demeanor on the stand.

[4] Ineffectiveness of trial counsel in not calling additional character witnesses has not been established.

3. *Failure to File Additional Motions.*

While Mr. Jacobson filed numerous pretrial motions including motions for the evaluation of petitioner's competency and sanity, for the appointment of additional counsel, for discovery, for appointment of a disinterested court reporter, for a change of venue, for payment of expert witness fees,

for individual *voir dire* and sequestration of jurors during the *voir dire*, for complete recordation of all proceedings, to suppress defendant's confessions, for appointment of an independent psychiatrist, to allow notification of defendant's intention to rely on an insanity defense and for a continuance, petitioner now contends that he "failed to engage in the systematic, exhaustive pretrial motion practice which is necessary to the effective defense in capital cases." Pet. for Writ of Habeas Corpus at 10. Some examples of motions that petitioner now contends should have been made are motions to prohibit the "death qualification" of the jury; to obtain a separate jury to try guilt and punishment; to challenge grand and petit jury composition; to obtain an independent psychiatrist for purpose of the penalty stage of the trial; to obtain a bill of particulars on the aggravating circumstances; to allow petitioner to participate as co-counsel; to have the death penalty statute declared unconstitutional and a motion in limine to restrict evidence as to the other homicides.

There is nothing in the record to indicate that these motions, if made in the form which petitioner now urges, would have been sustained or that the failure of the trial court to sustain any of them would have resulted in reversible error on appeal. The fruitlessness of many of the motions is demonstrated by the simple fact that they relate to the guilt phase of the trial and were in effect mooted by petitioner's confession that she committed the offense. Many other of the motions would have been without merit as being contrary to established North Carolina and federal law.

[5, 6] Where there is no reason to believe that a particular motion, if made, would have been granted, failure to make the motion does not constitute ineffective assistance of counsel. *United States v. Hood*, 593 F.2d 293 (8th Cir. 1979). Such is the case here.

4. *Ineffective Jury Argument.*

[7] Petitioner now contends that in his closing arguments in both phases of her trial Mr. Jacobson "had no theory of defense or of mitigation to present to the jury." It is further contended that in his arguments to the jury trial counsel "injected arbitrary, prejudicial material into the record and into the jury's deliberation processes." The court has read and re-read the jury arguments of this attorney during both phases of the trial, and it is unable to agree.

As has been noted several times herein, the case which Mr. Jacobson was called upon to defend was an almost hopeless one from the beginning. Not only had the petitioner confessed to the offense of poisoning her boyfriend, Stewart Taylor, by placing tasteless and colorless arsenic laden rat poison in his beer and tea resulting in his slow, agonizing death, but Jacobson knew that on the issue of intent the prosecution would doubtless offer petitioner's confessions to four other arsenic poisonings resulting in similar deaths. He therefore saw as the only realistic possibility of obtaining a verdict of anything less than first-degree murder with the death penalty that it would be necessary for him to negate the essential element of specific intent and thereby obtain a verdict of second-degree murder failing in which he would have to convince the jury that the mitigating circumstances of petitioner's long history of drug abuse, mental problems and personality disorders were sufficient to offset the aggravating circumstances and thus justify the jury's recommendation of a sentence of life imprisonment. While his arguments to the jury were by no means textbook models, it cannot be rightfully said that Mr. Jacobson did not make a vigorous assertion of these contentions during each of his jury arguments. Of course the cold record tells us nothing of what, if any, histrionics this attorney employed in his peroration to the jury in which he begged for this petitioner's life, but we do know that while the jury had deliberated for less than an hour in reaching the first-degree murder verdict following the guilt phase, the deliberations lasted more than three hours before the death penalty verdict was returned follow-

ing the sentencing phase. It seems clear, therefore, that at the very least Mr. Jacobson gave this jury something to think about. That the decision was finally made to reject his arguments proves only that he was ineffective in the sense that all criminal defense lawyers whose clients are found guilty are ineffective. That any more argument or different contentions might possibly have altered this result would be sheer speculation.

5. *Failure to Request Jury Instructions.*

Petitioner contends that trial counsel, Mr. Jacobson, also failed to provide effective assistance in that he failed and neglected to submit certain requests for jury instructions both at the guilt and sentencing phases of the trial. Specifically, it is charged that counsel should have requested that the patterned jury instruction for first-degree murder by poisoning be altered so as to remove any irrebuttable presumption concerning premeditation and intent; that the court should have been requested to instruct the jury on the lesser included offense of voluntary manslaughter; that a requested instruction prohibiting the jury from considering the evidence of other homicides during the penalty phase should have been submitted; that an instruction should have been requested concerning the consequences of a non-unanimous verdict in the penalty phase; and that counsel failed to request specific, explanatory instructions "with respect to mitigating circumstances arguably present in Mrs. Barfield's case, including the psychiatric mitigating circumstances . . . and the age of Ms. Barfield."

[8] The trial of this case was conducted before the Honorable Henry McKinnon, Jr., who is widely recognized as one of the most experienced and exceptionally able trial judges the state has produced. Given the fact that his instructions to the jury in this case have survived without question the close scrutiny of the Supreme Court of North Carolina, just how it might be established that the failure to request additional instructions constituted ineffective assistance of counsel is not readily apparent to this court. It would seem to involve a high degree of speculation as to whether the instruction, if requested, would have been given and an even higher degree of speculation as to whether the failure to give the instruction would have been held reversible error in the appellate courts. It is true that a requested instruction which correctly states the law and is related to facts received in evidence should ordinarily be given, but where the subject matter of the requested instruction has been otherwise covered in the charge, the failure to give it in the exact language requested is not error. For the most part that is the situation we have here.

It can be said with reasonable certainty that the requested instruction altering the pattern jury instruction in use in North Carolina in first-degree murder by poisoning cases would not have been given, and the instruction as given on this point has survived the close scrutiny of the North Carolina Supreme Court. See page 468 below.

The short answer to the failure of defense counsel to request an instruction on the lesser included offense of voluntary manslaughter at the guilt phase of petitioner's trial lies in the fact that such instruction would not have been supported by the evidence in the case. *See Dobbert v. Strickland*, 532 F.Supp. 545 (M.D.Fla.1982).

After having complained bitterly about the admission of the evidence of the other four homicides during the guilt phase of the trial petitioner now contends that the court should have been requested to instruct the jury not to consider the evidence of the other homicides during the penalty phase. Just why the petitioner would have wanted to draw the jury's attention once more to these four homicides is not readily apparent, but it is at least arguable that to have done so would have been an unwise tactic. Certainly it cannot be said that the failure to make such a request was outside the range of competence of lawyers who try criminal cases in North Carolina.

Under the North Carolina death penalty statute, N.C.G.S. § 15A-2000(b), a unani-

mous vote of twelve jurors is necessary in order to impose the death penalty, and the statute further provides that "if the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment...." The Supreme Court has held that in refusing during the sentencing phase of a first-degree murder trial to instruct the jury that its failure to agree unanimously on the sentence within a reasonable time will result in the imposition of a sentence of life imprisonment is not error for that the jury's failure to agree upon a sentence within a reasonable time is not a proper matter for jury consideration. Thus the requested instruction in this case would not have been given, and the failure to give it would not have been held for error on appeal. *State v. Johnson*, 298 N.C. 355, 369–370, 259 S.E.2d 752, 762 (1979) (*Johnson II*).

Judge McKinnon's instructions to the jury during the penalty phase were impeccable and eminently fair to both sides. He did in fact instruct the jury on the "psychiatric mitigating circumstances," and trial counsel's failure "to request specific, explanatory instructions with respect to mitigating circumstances arguably present" in the case is certainly no evidence of ineffectiveness, for a trial court is required to instruct the jury only on the basis of actual evidence offered and received in open court and not as to mere arguments of counsel. A review of Judge McKinnon's charge shows full compliance with this requirement.

The contention that Attorney Jacobson's failure to request certain jury instructions constituted ineffective assistance of counsel is without merit.

6. *Failure to Raise Errors on Direct Appeal.*

As a sixth major area of alleged ineffectiveness of counsel petitioner contends that trial counsel failed to raise, or to preserve, numerous errors of constitutional magnitude which occurred during the course of the trial. These issues will be addressed more fully in subsequent sections of this memorandum, but suffice it to say at this point that this court has found all of them to be without merit.

[9, 10] In summary, the court is of opinion that petitioner here has fallen far short of establishing that her trial counsel's error, if any, was so flagrant that it can only be concluded that it resulted from neglect or ignorance rather than from informed, professional deliberation. *Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir. 1977). Mere mistakes in judgment or even failure to recognize and investigate certain defenses does not necessitate a new trial, *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973), and a court should not measure the competency of counsel's advice by retrospectively considering whether it was right or wrong, but should confine the inquiry to the question of whether counsel's representation was within the range of competence demanded of attorneys in criminal cases. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). These principles have been neatly summed up by the Eighth Circuit in *Johnson v. United States*, 506 F.2d 640 (8th Cir. 1974), *cert. denied*, 420 U.S. 978, 95 S.Ct. 1404, 43 L.Ed.2d 659 (1975), where it is said:

> "The term 'effective,' in its most general application, describes something which ultimately achieves a desired result. With reference to professional representation in criminal cases, that might be interpreted to mean achieving only outright acquittal of the defendant on the charges without regard to the weight and strength of the evidence adduced. A more appropriate nomenclature for the standard would be to test for the degree of competence prevailing among those licensed to practice before the bar. The standard would refer more precisely to the professional competence of one who has completed a long and arduous course of study for a professional license, and who has acquired some experience in applying legal principles and conducting court trials.

"The professional standard could be said to include the responsibility to insure that the client is tried according to the applicable rules of evidence and practice and to urge such arguments on a client's behalf as are indicated by the evidence, or lack of evidence, adduced. It is not, however, constitutionally limited to an 'effective' type of representation that would achieve acquittal of a defendant on any charge regardless of the facts. The constitutional provision includes neither 'effective' nor 'adequate' nor other adjectival terms in its guarantee of assistance of counsel. It merely states in plain language that '[i]n all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defence.' U.S.Const. Amend. VI." *Id.* at p. 646 (footnotes omitted).

Application of these principles to the case at bar has served to foreclose a finding that the representation afforded petitioner by her trial counsel, Mr. Jacobson, failed to comport with constitutional requirements.

"To hold otherwise, at least in this case, gives impetus to a form of second guessing which is possible in every case and does not comport with the constitutional standards which require defense counsel to exercise only that skill and diligence possessed by competent counsel under like or similar circumstances." *Knott v. Mabry, supra,* at p. 1214.

Having found that petitioner was competently represented, we turn now to the several remaining claims for relief, the first of which arose as counsel selected the jury that was to hear the case.

JURY SELECTION

During jury selection Mr. Jacobson, the district attorney, and Judge McKinnon exhibited an intimate familiarity with the Supreme Court's ruling in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Each prospective juror was carefully questioned about his or her beliefs concerning capital punishment and the effect, if any, that those beliefs would have on his or her consideration of the questions of guilt and punishment. Eleven prospective jurors were excused for cause after stating that they could under no circumstances vote to impose the death penalty. Petitioner raises two separate contentions regarding these exclusions.

The first is that exclusion of jurors solely on the ground of their principled opposition to the death penalty violates petitioner's right to trial by an impartial jury drawn from a representative cross-section of the community. In *Witherspoon*, the Court "held that a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during *voir dire* examination that they had conscientious scruples against or were otherwise opposed to capital punishment." *Adams v. Texas*, 448 U.S. 38, 43, 100 S.Ct. 2521, 2523, 65 L.Ed.2d 581 (1980). Furthermore,

"[t]he Court recognized that the State might well have power to exclude jurors on grounds more narrowly drawn:

'[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.' [*Witherspoon v. Illinois*, 391 U.S.] at 522–523, n.21 [88 S.Ct. at 1776–77 n.21] (emphasis in original)." *Adams v. Texas, supra*, 448 U.S. at 44, 100 S.Ct. at 2523.

[11] Petitioner contends that the Supreme Court has yet to resolve whether that portion of the community which would automatically vote against the imposition of the death penalty may be excluded from a jury. The *Adams* opinion, however, clearly indicates that prospective jurors may be excluded if they are unable or unwilling to accept state law which provides that in

certain circumstances death is an authorized penalty and to address the issue of penalty in such a case without conscious distortion or bias. *Id.* at 45–46, 100 S.Ct. at 2524. No federal court has accepted the proposition that this "death qualification" of a jury deprives a defendant of trial by a jury drawn from a representative cross-section of the community, that it severs an essential link with evolving values of the community, or that the death qualified jury is impermissibly prone to convict. These contentions were addressed at length in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), where the court accepted as true the numerous disputed factual premises underlying the contentions but nevertheless found the contentions to be without merit. *Id.* at 591–599. Without reiterating the discussion by the Fifth Circuit in *Spinkellink*, this court finds the reasoning there persuasive and concludes that petitioner is entitled to no relief on this ground.[6]

With the exception of prospective juror Dent, discussed below, all prospective jurors excluded under *Witherspoon* stated without wavering that they could not consider voting to impose the death penalty under any circumstances. On the other hand, no juror stated that he would automatically vote to sentence any convicted murderer to death. *Compare Crawford v. Bounds*, 395 F.2d 297, 303–304 (4th Cir. 1968). There was, therefore, an impartial jury with all members able to determine both guilt and sentence free of any irrevocable prior commitment to vote for or against the death penalty. *See Spinkellink v. Wainwright, supra*, 578 F.2d at 596.

The second challenge to jury selection in this case concerns the exclusion of prospective juror Dent. During a lengthy *voir dire* examination,[7] Mr. Dent repeatedly stated that he did not believe in the death penalty. During questioning by the district attorney, Mr. Dent said that under no circumstances could he vote to impose the death penalty. Upon further questioning by the court, Mr. Dent retreated from this absolute statement, saying that he did not know whether he could vote for the death penalty. He was then "rehabilitated" by defense counsel, to whom Mr. Dent admitted that he could imagine cases in which he could vote for the death penalty. Examination by the district attorney recommenced and led to another about-face in which Mr. Dent said that he could not vote for the death penalty regardless of the evidence. Finally, the court resumed its questioning of Mr. Dent, asking "Do you feel that under no circumstances, no matter how aggravating the evidence might be, that you could not under any circumstances vote for the sentence recommending the death sentence?" Mr. Dent replied, "I don't believe I could." With that answer, Mr. Dent was excused for cause. Trial Transcript at 96.

[12] Petitioner contends that Mr. Dent's exclusion violated *Witherspoon* because he never stated unequivocally that he could not vote for the death penalty under any circumstance.[8] In support of this conten-

6. Petitioner asks the court to defer ruling on this contention until after disposition of four petitions for writs of habeas corpus currently pending in the United States District Court for the Western District of North Carolina. An extensive evidentiary presentation is being made in that court in an attempt to establish certain of the factual premises underlying the attack on the validity of the death-qualified jury. *See* Petition for Writ of Habeas Corpus at 18–19. The request is denied, principally for the reason that this case and those in the Western District will all undoubtedly reach the Fourth Circuit, which has not spoken on the issue and which will have full benefit of the record developed and decision rendered in the Western District cases.

7. The complete examination is set out in an appendix to this opinion.

8. Addressing this contention raised as to Mr. Dent and two other prospective jurors, the North Carolina Supreme Court said:

> "While it is true that taken by themselves, the answers that some of the jurors called to serve in defendant's trial seem to be equivocal or contradictory, taken as a whole, the examination indicates opposition to the death penalty so strong that they could not vote to impose it regardless of the evidence." *State v. Barfield, supra*, 298 N.C. at 324, 259 S.E.2d at 527.

This issue was one of two raised in the petition to the United States Supreme Court for a

tion petitioner correctly notes that the exclusion of even one prospective juror in violation of the *Witherspoon* standard invalidates a subsequent sentence of death, regardless of whether the state went to trial with peremptory challenges unexercised. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); *Moore v. Estelle*, 670 F.2d 56 (5th Cir. 1982); *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979), *adopted en banc*, 626 F.2d 396 (5th Cir. 1980). That the relevant statements by the prospective juror must be completely unequivocal has been recently reaffirmed by the Fifth Circuit in *Granviel v. Estelle*, 655 F.2d 673 (5th Cir. 1981). There a prospective juror

> "was first asked whether he had conscientious scruples against the infliction of the death penalty, whereupon he stated, 'I don't know what that means.' When asked if he could ever vote to inflict the death penalty, he replied, 'No, I don't *think* I could.' Then, in response to the question, 'You just don't *feel* like you would be entitled to take another person's life in that fashion?' He nodded and then said, 'No, I could not.'" *Id.* at 677.

The Fifth Circuit held that "[t]hese questions and answers fall far short of an affirmation by [the prospective juror] that he would automatically vote against the death penalty regardless of the evidence," thus invalidating the death sentence. *Id. See also Alderman v. Austin*, 498 F.Supp. 1134 (S.D.Ga.1980); *State v. Johnson*, 298 N.C. 355, 366, 259 S.E.2d 752, 759 (1979) (*Johnson II*).[9]

Petitioner contends that any time a prospective juror states that he "believes" or "thinks" or "feels" that he could not vote to impose the death penalty, rather than stating absolutely that he could not, the juror may not be excluded under *Witherspoon*. The precise words used by the juror, however, are not dispositive. *Burns* and *Granviel* turn instead on the perfunctory nature of the *voir dire* examination and on the fact that the questions were directed at whether the responsibility to recommend life or death would "affect" their deliberations as juror. In contrast, *Darden v. Wainwright*, 513 F.Supp. 947 (M.D.Fla.1981), the court held that there was no *Witherspoon* violation where a prospective juror, in response to a question as to whether he would be unwilling to return a recommendation of death, had answered, "I believe I would." *Id.* at 960. The court rejected the contention that this response was ambiguous and held that "the hard question *was* asked, repeatedly and without deviation from the minimal requirements of *Witherspoon*." *Id.* at 962. Similarly, in *McCorquodale v. Balkcom*, 525 F.Supp. 408 (N.D.Ga.1981), *appeal pending*, the court found that initial equivocation during *voir dire* examination was not fatal when the prospective jurors ultimately did make it unmistakably clear that they could not vote for the death penalty. The court assessed the "bottom line" rather than search the entire *voir dire* for signs of equivocation. *Id.* at 425. "The trial judge often must make judgments as to whether or not a prospective juror really means it when he says something. This Court believes some deference is due the judgment of the trial judge, who heard these two jurors as they stated that their reconsidered positions were that they could not impose the death penalty under any circumstances." *Id. See also Mason v. Balkcom*, 487 F.Supp. 554, 560 (M.D.Ga.1980), *reversed on other grounds*, 669 F.2d 222 (5th Cir. 1982); *Douglas v. Wainwright*, 521 F.Supp. 790, 796–800 (M.D.Fla.1981).

writ of certiorari following petitioner's direct appeal. The petition was denied. *Barfield v. North Carolina*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980).

In *Johnson II*, the North Carolina Supreme Court held that it was error under *Witherspoon* to exclude a prospective juror who, when asked whether under any circumstances he would vote for the death penalty, answered "I don't think so." The court held that this answer was not sufficiently unequivocal to permit exclusion but upheld the imposition of the death sentence because the defendant failed to demonstrate prejudice from the error. The proposition that prejudice must be shown to entitle a petitioner to resentencing after a *Witherspoon* violation has been rejected by the Fifth Circuit. *Moore v. Estelle*, 670 F.2d 56 (5th Cir. 1982).

[13] The court views the examination of Mr. Dent in the same light. Although he certainly equivocated during the *voir dire*, he stated several times that under no circumstances could he vote to recommend the death sentence. The trial judge was actively involved in the examination and carefully phrased the "hard" question. He apparently believed that Mr. Dent's opinion ultimately was unequivocal. This court agrees and therefore holds that there was no *Witherspoon* violation in the exclusion of Mr. Dent. Indeed, in view of Mr. Dent's many statements that he could not under any circumstances vote to impose the death penalty, denying the motion to excuse him for cause might well have been error.

GUILT PHASE

Four of petitioner's asserted grounds for relief arise from the guilt phase of the trial. Two contest the admission of particular evidence, the third challenges the jury instructions defining first and second-degree murder, and the fourth is an attack on a presumption inherent in North Carolina's first-degree murder statute. Only the evidentiary issues were discussed at length by the North Carolina Supreme Court. *State v. Barfield*, 298 N.C. at 325–331, 338–341, 259 S.E.2d at 527–530, 535–536.

[14, 15] In addressing asserted trial errors, this court is fully aware that it may not grant relief to a state prisoner on the basis of ordinary errors. Rather, the test is one of fundamental fairness; the error must be so egregious as to amount to a denial of constitutional due process. *E.g., Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974); *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960). As the Fifth Circuit has recently stated, "the erroneous admission of prejudicial evidence can justify habeas corpus relief only if the error was 'material in the sense of a crucial, critical, highly significant factor.'" *Bryson v. State of Alabama*, 634 F.2d 862, 865 (5th Cir. 1981), *quoting Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir.), *cert. denied sub nom., Hills v. Maggio*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976). The Supreme Court has recently "reaffirm[ed] the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, — U.S. —, 102 S.Ct. 1584, 1593–1594, 71 L.Ed.2d 816 (1982) (footnote omitted). Only "those errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained" should entitle a petitioner to habeas relief. *Rose v. Lundy*, — U.S. —, 102 S.Ct. 1198, 1216, 71 L.Ed.2d 379 (1982) (Stevens, J., dissenting).

[16] Petitioner first asserts error in the admission of evidence tending to show that she was responsible for the poisoning deaths of four other individuals, not including the murder for which she was convicted. Admission of this "other crime" evidence was based upon long-established state law permitting its use when probative of a defendant's knowledge of a relevant set of circumstances, specific intent to commit the crime, motive for the crime, or plan or design to commit the crime. *State v. Barfield*, 298 N.C. at 325–331, 259 S.E.2d at 527–530; *State v. Walker*, 251 N.C. 465, 112 S.E.2d 61, *cert. denied*, 364 U.S. 832, 81 S.Ct. 45, 5 L.Ed.2d 58 (1960); *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954). *Cf.*, Federal Rule of Evidence 404(b). The evidence was clearly relevant here since petitioner had denied that she knew the fatal properties of the poison she administered, that she intended to kill Mr. Taylor, and that she had a financial motive for doing so. The circumstances of each of the prior killings tended forcefully to rebut those denials. Petitioner contends, however, that despite its relevance the evidence was unduly prejudicial and that in a capital case such prejudice introduces an impermissibly arbitrary and unreliable element into the determination of guilt. Unquestionably, in a capital case "rules that diminish the reliability of the guilt determination" are unacceptable.

Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392 (1980). Contrary to petitioner's contention, however, there was no impermissible unreliability here. The evidence itself was not in dispute; petitioner admitted the prior crimes. That the prior crimes were unusually probative of intent, motive and knowledge does not render that evidence prejudicial nor unreliable. That other defendants in capital cases are tried without the use of evidence of any prior acts in no way means that its admission here creates an arbitrary or unreliable factor.

The second evidentiary issue raised is an asserted violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Petitioner was arrested on March 10, 1978, and questioned about the death of Mr. Taylor. Prior to the interrogation she was fully advised of her constitutional rights in accordance with *Miranda*, and she denied any responsibility for the death. On March 13, 1978, she returned to the sheriff's office at the request of and in the company of her son, who had been contacted by the sheriff's office. At that time, she was again informed of her *Miranda* rights, and she confessed to four poisonings, including the Taylor murder. A written waiver of *Miranda* rights was executed and the statements were reduced to writing by one of the deputy sheriffs who interviewed her.[10]

There was no *Miranda* violation. Petitioner after being advised of her rights stated that she did not want a lawyer and that she wanted to make a statement. She never exercised her "right to cut off questioning," *Miranda v. Arizona*, *supra*, 384 U.S. at 474, 86 S.Ct. at 1627, or indicated that she did not wish to discuss the murders. Rather she denied any knowledge of the murders on one occasion and confessed fully on the second occasion.[11]

Petitioner next contends that Judge McKinnon did not sufficiently differentiate first and second-degree murder when outlining the elements of those two offenses for the jury. The basis for the contention is not simply that there was technical error in the instructions but additionally that the inadequacy had the effect of merging the two offenses, leaving the jury only with the options of conviction of capital murder or acquittal and thereby enhancing the risk of an unwarranted conviction and diminishing the reliability of the guilt determination. Petitioner relies on *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), where the Supreme Court held that in a capital case the option to convict of a lesser included offense could not constitutionally be withdrawn from the jury where the evidence arguably would support the lesser included offense conviction. In *Beck*, however, the Court addressed a statutory scheme rather than the wording of a particular jury instruction, and the case provides little guidance here, where the lesser included offense was submitted to the jury. More importantly, the contention is without a factual foundation because Judge McKinnon did fully differentiate the elements of

10. Petitioner contends that on March 13 she was not fully advised of her rights but was only reminded that she still had the rights described to her on March 10 and that such a reminder is insufficient under *Miranda*. The state court conducted a *voir dire* hearing when petitioner moved to suppress the confessions and there was conflicting testimony. Deputy Sheriff Lovett stated that petitioner was fully advised of her rights on March 13, but petitioner's son stated that she was only told that she "still [had] her rights." The state court generally found the facts to be as testified to by Mr. Lovett and specifically found "that the Defendant was verbally informed of her rights, or her rights were recalled to her" on March 13. Trial Transcript at 483–511. Petitioner has asserted no challenge to the presumption of correctness enjoyed by these findings, 28 U.S.C. § 2254(d), and the court perceives none and adopts them. By generally finding the facts as stated by the deputy sheriff, Judge McKinnon necessarily also found that petitioner stated specifically that she did not want a lawyer and that she wanted to make a statement on March 13. Trial Transcript at 491.

11. Therefore *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), cited by petitioner, is inapposite, for it discusses interrogation of a suspect who has invoked his right to remain silent. Unlike in *Mosley*, there is no reason here to view petitioner's waiver of her *Miranda* rights skeptically. *See id.* at 110 n.2, 96 S.Ct. at 329 n.2. (White, J., concurring).

the two crimes and adequately defined both intent to kill and malice. Trial Transcript at 818–820.

Petitioner's final contention arising from the guilt phase is that the North Carolina murder statute contains an impermissible presumption that a murder by poisoning is premeditated. In pertinent part, the statute provides that "[a] murder which shall be perpetuated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing ... shall be deemed to be murder in the first degree...." N.C. G.S. § 14–17. Judge McKinnon instructed the jury that the statute conclusively presumes that murder by means of poisoning is premeditated and deliberate. Trial Transcript at 818–819.

Petitioner concedes that the State of North Carolina may define what facts comprise any crime, but argues that the statute requires proof of premeditation in all murders, committed by any means, and that presuming premeditation in a murder by poisoning "paves the road" to a finding of intent to kill. Petitioner's reliance on *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), in support of this contention is misplaced. In *Sandstrom* a jury was instructed to presume the existence of a fact clearly necessary under state law to prove the crime charged. *Id.* at 520, 99 S.Ct. at 2457. Here, in contrast, the statute's plain language requires proof of premeditation only in a murder committed by some means not specifically stated in the statute. *See State v. Duboise*, 279 N.C. 73, 83, 181 S.E.2d 393 (1971); *State v. Hendrick*, 222 N.C. 447, 61 S.E.2d 349 (1950); *State v. Dunheen*, 224 N.C. 738, 32 S.E.2d 322 (1944). This was more recently reiterated in *State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975), where the court noted that "[i]t is well established that to convict a defendant of murder in the first degree, *when the killing was not perpetrated by one of the means specified by G.S. 14–17* ... the State must prove beyond a reasonable doubt that the killing was with premeditation and deliberation." *Id.* at 572, 213 S.E.2d at 320 (emphasis added). *See id.* at 591–595, 213 S.E.2d at 332–335 (Sharp, C. J., dissenting). Where a fact need not be proved to make out a crime, presuming that fact does not violate *Sandstrom* or *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Moreover, premeditation was simply not in issue in this case. Petitioner repeatedly admitted that she knowingly and deliberately purchased the poison and administered it to Mr. Taylor. Trial Transcript at 618. The only element in issue was whether she did so with intent to kill. In *State v. Dunheen, supra*, the court stated:

> "When a homicide is perpetuated by means of poison, lying in wait, imprisonment, starving, or torture, the means and method used involve planning and purpose. Hence the law presumes premeditation and deliberation. The act speaks for itself. G.S., 14–17. Is this presumption rebuttable by proof that the prisoner is of such low mentality that he is incapable of forming a fixed design to kill? 224 N.C. at 739–740, 32 S.E.2d at 323.

The *Dunheen* court did not answer its question, finding that there was no evidence of "low mentality" in the case. Here, there was no evidence of a lack of premeditation, so the question of whether in some case the state's definition of first-degree murder might deprive a defendant of due process of law is simply not raised.

Having found no flaw in petitioner's conviction of first-degree murder sufficient to warrant habeas relief, the court now turns to the sentencing phase of the case.

SENTENCING PHASE

Under North Carolina's bifurcated capital punishment scheme, the question of punishment is determined by a jury following a conviction of first-degree murder. N.C.G.S. § 15A–2000(a). Insofar as possible the sentencing proceeding is to be conducted by the same judge before the same jury that determined guilt, and the proceeding must commence as soon as practicable after the verdict of guilt is returned. *Id.* Evidence admitted during the guilt determination

phase may be considered by the jury in passing on punishment, and additional evidence may be heard "as to any matter that the court deems relevant to sentence." *Id.* When supported by the evidence and submitted to it by the judge, the jury must consider specific aggravating circumstances, limited to those listed in the statute, and specific mitigating circumstances including, but not limited to, those listed in the statute. *See* N.C.G.S. § 15A-2000(e), (f). Aggravating circumstances must be proved by the state beyond a reasonable doubt, while mitigating circumstances must be proved by the defendant by a preponderance of the evidence. N.C.G.S. § 15A-2000(c)(1); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979) (*Johnson I*). The jury must determine whether the aggravating circumstances "are sufficiently substantial to call for the imposition of the death penalty" and whether the mitigating circumstances "are insufficient to outweigh the aggravating ... circumstances." N.C.G.S. § 15A-2000(c)(2), (3). The sentencing verdict must be unanimous, and if the jury cannot unanimously agree, the judge must impose a sentence of life imprisonment. N.C.G.S. § 15A-2000(b).[12]

Petitioner raises numerous asserted grounds for relief arising during the sentencing phase of her case. These include the consideration by the jury of the evidence of the other murders, the submission of particular aggravating circumstances to the jury, asserted errors in the instructions to the jury regarding the mitigating circumstances to be considered, an assertedly inaccurate summary of defendant's proof concerning sentence, and a failure to instruct the jury that the effect of an inability to reach a unanimous verdict would be imposition of a sentence of life imprisonment. The court will address these contentions in sequence.

1. *Evidence of Other Murders.*

Petitioner's first challenge to the validity of her sentencing proceeding is that Judge McKinnon failed to instruct the jury that it could not consider the evidence of the other murders when deliberating upon sentence. Relying on case authority to the effect that a jury in a capital sentencing proceeding may not consider a nonstatutory aggravating circumstance, petitioner contends that the trial court impermissibly broadened the jury's discretion and in effect created a non-statutory aggravating circumstance by instructing the jury that it could consider all the evidence admitted during the guilt phase.[13] She argues that the evidence of the other murders was not relevant to any of the statutory aggravating circumstances.

[17] Judge McKinnon did not specifically direct the jury's attention to the evidence of the other murders. He stated only that the jury could consider all evidence admitted during the guilt phase. This instruction was specifically authorized by the North Carolina statute, which provides that "[i]n the [sentencing] proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is empaneled, but all such evidence is competent for the jury's consideration in passing

12. The North Carolina statute thus resembles in many respects that adopted by Georgia and found constitutional in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), primarily on the grounds that it reliably guides the sentencer's exercise of discretion in determining whether to impose the death penalty. In *State v. Barfield*, *supra*, the North Carolina Supreme Court determined for the first time that the current North Carolina death penalty statute was constitutional. *See generally*, *Comment: Evolving Standards of Decency: The Constitutionality of North Carolina's Capital Punishment Statute*, 16 Wake Forest L.Rev. 737 (1980).

13. The court notes that N.C.G.S. § 15A-2000(e)(11), creating as an aggravating circumstance proof that "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons," might authorize independent evidence of other crimes during the sentencing proceeding, but was not in effect during petitioner's trial, having been added to the statute in 1979.

on punishment." N.C.G.S. § 15A-2000(a)(3). The evidence was clearly relevant to the jury's consideration of the aggravating factors of whether the crime was committed for pecuniary gain and whether the crime was committed to hinder the enforcement of laws for it tended to show that she had a well-founded expectation of being able to reap financial gain from the murder and to prevent discovery of her actions.[14]

Concluding that the evidence was admitted under statutory authority, was relevant and did not create an undue risk of arbitrary imposition of the death penalty, the court finds *Henry v. Wainwright*, 661 F.2d 56 (5th Cir. 1981), *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), *cert. granted*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), certified to the Supreme Court of Georgia, —— U.S. ——, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), and *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), all to be inapposite, as all concern the actual submission to the jury of an unauthorized or non-statutory aggravating circumstance.

2. *Submission of Aggravating Circumstances.*

[18] Two contentions are raised concerning the trial court's submission of three aggravating circumstances for the jury's consideration. The first is that there was an impermissible overlappage between the "pecuniary gain" and the "hindering the enforcement of the laws" aggravating circumstances. *See* N.C.G.S. § 2000(e)(6), (7). The jury found that both factors were present. It is contended that the jury may have compounded a single aggravating circumstance into two separate ones, thereby risking an arbitrary imposition of the death penalty. *See State v. Goodman*, 298 N.C. 1, 23–29, 257 S.E.2d 569, 587 (1979). The evidence unquestionably supported the submission of both circumstances, for petitioner herself had testified that dual motives for the poisonings were to enable her to carry out the forgeries and to protect herself from being prosecuted for them. Trial Transcript at 553–554, 617–618, 651, 657–658. Judge McKinnon's instructions did not unduly muddle these separate factors. There is no arbitrary or impermissible compounding of aggravating factors where the evidence fully supports each.[15]

[19] Petitioner next contends that the submission of the "especially heinous, atrocious, or cruel" aggravating circumstance was impermissible because not sufficiently limited as required by *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and *State v. Goodman*, *supra*. In *Godfrey* the Supreme Court vacated a death sentence which was based in part upon a jury's finding that the murder was heinous where the crime could not be said to be materially more depraved than any other murder. 446 U.S. at 430–433, 100 S.Ct. at 1765–67. Here, however, Judge McKinnon fully anticipated *Godfrey* and narrowly defined the words "especially," "heinous," "atrocious," and "cruel." Trial Transcript at 887. The court did not imply to the jury that there was an inherent cruelty or atrocity in every murder, an implication later prohibited in *Godfrey*. The evidence depicting the slow and agonizing demise of Mr. Taylor while petitioner stood by holding the key to his life in her hands fully sup-

14. The court's view that the evidence was relevant to the aggravating circumstances is not meant to express any opinion as to whether the evidence of other murders could have been admitted in sentencing proceeding had it not been presented during the guilt phase.

15. The court notes that Nebraska has given its "pecuniary gain" aggravating circumstance a very narrow interpretation, in essence permitting its submission only in a murder-for-hire set of facts. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). *See* Comment, *supra*, 16 Wake Forest L.Rev. at 736 n.162. North Carolina has rejected this interpretation and held that submission of the pecuniary gain circumstance is permissible in a killing which occurs during an armed robbery, where "hope of pecuniary gain provided the impetus for the murder ...." *State v. Oliver*, 302 N.C. 28, 62–63, 274 S.E.2d 183, 204–205 (1981). The *Oliver* court did not consider the question of overlappage between the "pecuniary gain" and the "hinder law enforcement" aggravating circumstances.

ports submission of this aggravating circumstance.[16]

3. *Instructions On Mitigating Circumstances.*

[20] After instructing the jury on the applicable aggravating circumstances, Judge McKinnon turned to the mitigating circumstances and submitted to the jury the specific circumstances of "impaired capacity" and "mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2), (6). He also submitted to the jury an open-ended instruction permitting the jury to consider "from the evidence any circumstance or circumstances which appear to [it] to lessen the seriousness of the crime charged or suggest a lesser penalty than otherwise would be required." Trial Transcript at 892-893, N.C.G.S. § 15A-2000(f)(9). Defendant raises several contentions concerning the adequacy of the instructions on the various mitigating circumstances. As petitioner correctly notes, these instructions must be scrutinized for compliance with the principle that a jury must be permitted to consider any and all possible mitigating factors. *Eddings v. Oklahoma*, —— U.S. ——, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Under the North Carolina death penalty statute the trial judge must instruct the jury to consider any mitigating circumstance "which may be supported by the evidence," and the court "shall furnish to the jury a written list of issues relating to such ... circumstances." N.C.G.S. § 15A-2000(b).

[21] Petitioner first contends that Judge McKinnon should have submitted three additional mitigating circumstances which were supported by the evidence: no significant history of prior criminal activity, acting under duress, and the age of the defendant. N.C.G.S. § 15A-2000(f)(1), (5) & (7). As to the first of these, petitioner asserts that because she had no significant history of prior *convictions*, she therefore had no history of prior criminal *activity*. The statute is not limited, however, to convictions, and the evidence was uncontroverted that petitioner had a significant history of prior criminal activity, namely four other homicides. *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979) (*Johnson I*), cited for the proposition that "prior criminal activity" is limited to prior convictions, does not so hold. *See id.* at 71-72, 257 S.E.2d at 615. Similarly, the mitigating circumstances of acting under duress was inapplicable, because there was no evidence that petitioner acted under the influence or coercion of any other person. Petitioner's age, forty-five years at the time of the crime, could not rationally be considered a mitigating circumstance. Moreover, Mr. Jacobson did not request specific instructions on any of these mitigating circumstances. When counsel makes no request for additional mitigating circumstance instructions, "failure of the court to mention any particular item as a possible mitigating factor will not be held for error so long as the trial judge instructs that the jury may consider any circumstance which it finds to have mitigating value pursuant to G.S. 15A-2000(f)(9)." *Id.* at 72, 257 S.E.2d at 616. The jury was in no way precluded by the operation of law or the instructions of the court from considering any evidence relevant to mitigation. *Compare Lockett v. Ohio, supra.*

It is also contended that Judge McKinnon failed adequately to differentiate between the mitigating circumstances of mental and emotional disturbance and diminished impairment and between those circumstances and the *M'Naughten* test for legal insanity, citing *State v. Johnson (Johnson I), supra*, where the state Supreme Court held that a trial court which only read the language of the statute insufficiently guided the jury in its consideration of the impaired capacity mitigating circumstance. 298 N.C. at 63-

16. The submission was not based merely upon the fact that Mr. Taylor suffered a lingering death. *See State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981). Rather, the evidence that petitioner stood by for days, never telling family or medical personnel of the cause of Mr. Taylor's illness when his life could have been saved, and that she watched him suffer horribly, were the elements of heinousness critical here.

70, 257 S.E.2d at 610–614. Here, the contention is without a factual foundation since Judge McKinnon specifically distinguished the insanity test from the impaired capacity circumstance and in no way muddled the two mitigating circumstances. Trial Transcript at 891–893.

[22, 23] Also without merit is the contention that the death sentence here is invalid because Judge McKinnon failed specifically to elaborate various plausible non-statutory mitigating circumstances. No such circumstances supported by the evidence admitted at trial have been suggested. Under state law the court has no obligation specifically to instruct on non-statutory circumstances which are not called to its attention. *State v. Goodman, supra*, 298 N.C. at 34, 257 S.E.2d at 590 (1979). There was no constitutional violation because the jury was not *precluded* from considering non-statutory mitigating factors. *Lockett v. Ohio, supra*, 438 U.S. at 608, 98 S.Ct. at 2966; *Washington v. Watkins*, 655 F.2d 1346, 1377 (5th Cir. 1981).

[24] Petitioner next contends that by failing to specifically instruct the jury that the burden of proof on mitigating circumstances was by a preponderance of the evidence, Judge McKinnon committed a fatal error. He did, however, tell the jury that the defendant's burden was not proof beyond a reasonable doubt and indicated that mitigating circumstances would be present if the jury "merely" found them to exist "from the evidence." Trial Transcript at 891. The jury was not insufficiently guided in this respect in its consideration of mitigating factors.

Finally, petitioner contends that Judge McKinnon failed to instruct the jury correctly concerning the independent role to be given mitigating circumstances. The court stated that if both aggravating and mitigating circumstances were found, the jury must consider whether the mitigating circumstances "outweigh" the aggravating circumstances. Trial Transcript at 896–897. The weighing of mitigating and aggravating circumstances was approved in dictum in *Lockett v. Ohio, supra*, and in *Proffitt v. Florida*, 428 U.S. 242, 248–251, 96 S.Ct. 2960, 2964–66, 49 L.Ed.2d 913 (1976). Mitigating circumstances are given sufficient "independent mitigating weight," *Lockett v. Ohio, supra*, 438 U.S. at 605, 98 S.Ct. at 2965, in a balancing with aggravating factors. Moreover, in this case the jury before it reached the "balancing" question had already determined that there were no mitigating circumstances to be weighed, whether by balance or otherwise.

To summarize, the instructions of Judge McKinnon concerning the jury's consideration of mitigating factors fully complied with state law. They in no way precluded the jury from considering any evidence relevant to mitigation nor introduced any impermissible or arbitrary factor into the sentencing process.

4. *Other Asserted Errors in Sentence Phase Instructions.*

[25] Two other challenges are raised to Judge McKinnon's sentencing instructions. The first is that he inaccurately summarized petitioner's proof in mitigation, and the second is that he failed to tell the jury of the result should it be unable to reach a unanimous verdict. Neither of these contentions entitle petitioner to relief. Informing the jury of the effect of their failure to reach a unanimous verdict is not permitted under state law. *State v. Hutchins*, 303 N.C. 321, 353, 279 S.E.2d 788 (1981); *State v. Johnson, supra (Johnson II)*. The Supreme Court of Louisiana has taken contrary position, *State v. Williams*, 392 So.2d 619, 633–635 (La.1980). The hypothesis that such an instruction would remove a factor of unreliability is questionable, and the court concludes that such an instruction is not required under *Beck v. Alabama, supra*.[17]

17. Petitioner contends that a juror who conscientiously believes that the evidence called for a life sentence might nevertheless vote for the death penalty in order to avoid mistakenly assumed consequences of jury deadlock. Although this scenario is plausible, so is the converse possibility that a juror convinced of the appropriateness of a life sentence would refuse

Judge McKinnon's summary of petitioner's evidence is contended to have implied that petitioner admitted the killings were intentional and to have confused proof of mental illness with proof of drug abuse. After careful review of the charge, however, the court finds no substantial inaccuracy and certainly no inaccuracy sufficient to introduce a significant risk of arbitrariness into the sentencing hearing or to preclude the jury from giving full consideration to the evidence presented in mitigation.

APPELLATE REVIEW

The North Carolina Supreme Court is required to overturn any sentence of death when "the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). Petitioner contends that the North Carolina Supreme Court did not adequately engage in this mandatory "proportionality" review since the court did not affirmatively state that it had compared the sentence in this case with that imposed in other cases and since the court has not expressly adopted any means for implementing proportionality review. *See Comment*, *supra*, 16 Wake Forest L.Rev. at 758–759. The Supreme Court stated:

"We do not take lightly the responsibility imposed on us by G.S. 15A-2000(d)(2). We have combed the record before us. We have carefully considered the briefs and arguments which have been presented to us. We conclude that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it. We find nothing in the record which would suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. The manner in which death was inflicted and the way in which defendant conducted herself after she administered the poison to Taylor leads us to conclude that the sentence of death is not excessive or disproportionate considering both the crime and the defendant. We, therefore, decline to exercise our statutory discretion to set aside the sentence imposed." *State v. Barfield*, *supra*, 298 N.C. at 354–355, 259 S.E.2d at 544.

[26] The statute does not require that the court establish a particular means for implementing proportionality review. *Compare* Ga.Code Ann. § 27-2537, discussed in *Gregg v. Georgia*, 428 U.S. 153, 204–206, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1976). As the respondents indicate, by the time *Barfield* was decided, the North Carolina Supreme Court had decided four other death penalty cases under N.C.G.S. § 15A-2000 and several additional first-degree murder cases, thus giving the court a body of cases against which it could conduct a proportionality review, and there is no basis for assuming that the court failed to fulfill the requirements of the statutory scheme. In approving the Georgia statute, the United States Supreme Court did not erect detailed requirements for proportionality review but merely stated that proportionality review "serves as check against the random or arbitrary imposition of the death penalty." *Gregg v. Georgia*, *supra*, 428 U.S. at 206, 96 S.Ct. at 2940. *Accord*, *Proffitt v. Florida*, 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976). While actual disproportionality might afford grounds for habeas relief, *Lockett v. Ohio*, *supra*, 438 U.S. at 624–628, 98 S.Ct. at 2963–65 (White, J., concurring); *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), no such showing has been made here.

to consider the evidence and the views of other jurors in support of the death penalty, knowing that his blind obstinance would perforce result in a life sentence. Neither scenario results in a "reliable" or desirable process of deliberation,

but the court cannot conclude that the first scenario is significantly more likely to occur as a result of not giving the instruction than is the second as a result of giving it.

ARBITRARY IMPOSITION OF THE DEATH PENALTY

[27] As the final challenge to the validity of the sentence of death, petitioner contends that the penalty is unconstitutional because arbitrarily administered in North Carolina. In support of this contention petitioner asks the court to defer decision pending the completion of a relevant study by Barry Nakell, Professor of Law at the University of North Carolina. No anticipated date for the completion of this study has been mentioned, and the court notes that two years ago, petitioner made the same request of Judge Braswell, indicating at that time that the study was quite close to completion. Judge Braswell declined to await the study and so does this court. In the absence of any factual proof,[18] the contention cannot be sustained.

CONCLUSION

The court has carefully and thoroughly considered each of the issues petitioner has raised and has concluded that, taken individually and collectively, they do not entitle petitioner to relief. She received a fair trial and able representation. The evidence against her was overwhelming. She was convicted and sentenced in strict compliance with a constitutionally sound statutory scheme by twelve of her peers who unanimously concluded that, beyond a reasonable doubt, the death penalty should be imposed in this case. Judge McKinnon ably anticipated many later developments in capital punishment law and presided with his accustomed skill over the trial. No grounds for relief having been found, respondents' motion to dismiss the petition must be granted and the petition dismissed, and it is

SO ORDERED.

18. Petitioner has offered raw figures purportedly showing that as of December 31, 1979, the race of the victim is the best "explainer" of the imposition of the death penalty in North Carolina. Petition for Writ of Habeas Corpus, Appendix A. The figures, however, do not explain but merely correlate, and only examine demographic factors, leaving unexplored all considerations of the circumstances of the crime, the presence or absence of aggravating and mitigating factors, and the relevant nondemographic characteristics of the defendant. By stating that the Nakell study is "the only potentially available evidence relevant and material to the determination of the arbitrary imposition issue," Petition for Writ of Habeas Corpus, Appendix B, counsel for petitioner implicitly admits that the 1979 figures fail to prove anything.

APPENDIX: VOIR DIRE OF JUROR DENT

[By Mr. Britt, the District Attorney]

Mr. Dent, where do you live?

MR. DENT: Bladenboro.

MR. BRITT: Are you a married man, sir?

MR. DENT: Yes, sir.

MR. BRITT: Do you have children?

MR. DENT: No, sir.

MR. BRITT: Mr. Dent, how do you feel about capital punishment, sir? Are you opposed to it or do you feel like it is a necessary law?

MR. DENT: I don't believe I could vote on death.

MR. BRITT: Are you saying then that you are opposed to the death penalty?

MR. DENT: I don't believe in it.

MR. BRITT: Don't believe in it?

MR. DENT: No.

MR. BRITT: Well, do you believe in any cases or some cases?

MR. DENT: I believe in some cases.

MR. BRITT: Well, it would have to be a special case. Is that what you are saying?

MR. DENT: Yes. I just don't believe in it.

MR. BRITT: Let me ask you this: Even though you believe in it in special cases, could you be a part of it in a special case, that is, could you sit on the jury and vote to return a judgment or recommendation to the Court which would cause the death penalty to be imposed?

MR. DENT: I don't believe I could.

MR. BRITT: Under no circumstances?

MR. DENT: I don't believe I could.

APPENDIX—Continued

MR. BRITT: Well, we are looking for a yes or no answer, if we can get it. Do you feel that you could serve on a jury and return a verdict of death or a judgment of death?

MR. DENT: I don't believe I could, no, sir.

MR. BRITT: Are you saying you couldn't do that under any circumstances?

MR. DENT: I don't know. It is the first time I have ever been in something like this.

MR. BRITT: Are you saying you could not do that regardless of the evidence?

MR. DENT: It is hard to do.

MR. BRITT: Sir?

MR. DENT: It would be hard to do.

MR. BRITT: I understand it would be hard to do. Are you saying you could not do it under any circumstances?

MR. DENT: I don't know.

MR. BRITT: Sir?

MR. DENT: I don't know.

MR. BRITT: Do you need a few minutes to think, Mr. Dent?

MR. DENT: I don't believe I could sit on it and do that.

MR. BRITT: Are you saying you could not sit?

MR. DENT: Yes.

MR. BRITT: Sir?

MR. DENT: Yes, sir.

MR. BRITT: And under no circumstances could you sit on a case in which the death penalty would be imposed. Is that correct?

MR. DENT: Yes, sir.

MR. BRITT: For cause, your Honor.

COURT: Let me say to the jurors who have just recently come in, as has been indicated, this is a case where First Degree Murder is charged; and the law of our state at the present permits the death penalty under certain circumstances where a person is found guilty of first degree murder. In the trial of this case, the jury will first hear evidence and determine whether the Defendant is guilty of First Degree Murder or some lesser offense or not guilty of the crime. If she should be found guilty of First Degree Murder, then after the jury has returned its verdict as to guilt, there will be a later proceeding in which other evidence may be offered and from which the jury determines its recommendation as to sentence. The recommendation may be for the death sentence or it may be for life imprisonment. You will be asked to consider whether aggravated circumstances exist sufficient to require the death sentence to be imposed, so that is the procedure this trial will take as it goes forward. Now, Mr. Dent, if you understand or think you understand that explanation of what the law is and you are called on—if the Defendant was found guilty of First Degree Murder in the first stage of the trial, and you thereafter heard evidence as to any aggravating and mitigating circumstances that may affect the punishment, do you feel that there are any circumstances so aggravated that you could vote for the recommendation of the death sentence?

MR. DENT: I don't know.

COURT: You are not certain at this time?

MR. DENT: No, sir.

COURT: Do you think you understand the procedure that we will be going through and what the jury will be required to consider?

MR. DENT: Yes.

COURT: And do you believe that there may be aggravating circumstances sufficient that you could in certain cases vote for the death penalty, or do you know?

MR. DENT: I don't know.

COURT: To those four jurors, I will say there are people who favor the death penalty. There are people who oppose it and there are people who even though they oppose the death penalty as a matter of religious or moral scruples feel that they can follow the law that the legislature has provided and carry out their duty as a juror in spite of their personal feelings or convictions. Now, Mr. Dent, at this time I'm

APPENDIX—Continued

asking you do you feel that your scruples or convictions about the death sentence are such that you could not, under any circumstances that you can imagine, vote for the death penalty?

MR. DENT: I don't know.

COURT: Do you feel you are able to say at this time?

MR. DENT: I don't.

COURT: Any other questions?

MR. JACOBSON: Mr. Dent, you could follow the law as handed down by the Court in determining whether this Defendant was guilty or innocent, could you not?

MR. DENT: Sir?

MR. JACOBSON: You could rule on whether she was guilty or innocent. You wouldn't have any problem with that part of the trial, would you?

MR. DENT: No.

MR. JACOBSON: You read the newspapers and listen to the radio, do you not?

MR. DENT: I listen to television. I haven't heard nothing about the case.

MR. JACOBSON: I am not talking about this case. You have heard of other murder cases, have you not?

MR. DENT: Yes, sir.

MR. JACOBSON: Probably a whole lot of them over your lifetime. I want you to think about the worst one you have ever heard about.

MR. BRITT: I object to that.

COURT: Overruled.

MR. JACOBSON: Are you thinking about the worst one you have ever heard about?

MR. DENT: Yes.

MR. JACOBSON: Could you render the death sentence in that case?

MR. DENT: Yes, sir.

MR. JACOBSON: Nothing further.

COURT: Challenge denied at this time.

MR. BRITT: All right. I take it, since you say you could render the death sentence in that case, if you sat on this jury and you were satisfied that this case was the type of case that you thought the death penalty should be imposed in, and you felt that way beyond a reasonable doubt, you could vote to impose the death penalty. Is that correct, Mr. Dent?

MR. DENT: Yes.

MR. BRITT: Sir?

MR. DENT: I reckon when I hear the case.

MR. BRITT: I understand that but if you were satisfied and satisfied beyond a reasonable doubt that this was the type of case in which the death penalty should be imposed, you would vote to impose it, would you not?

MR. DENT: I don't believe in capital punishment.

MR. BRITT: You don't believe in capital punishment. All right, sir. Let me ask you this: Are you saying that regardless of the circumstances and regardless of the facts you just simply could not vote to impose the death penalty for anybody? Is that what you are saying, sir?

MR. JACOBSON: Objection. He answered it.

COURT: Overruled.

MR. DENT: I don't believe in it.

MR. BRITT: I know that. You say you don't believe in it. Is that based on moral or religious scruples that you have, sir?

MR. DENT: I just don't believe in it.

MR. BRITT: Is your feelings so strong that regardless of the circumstances and regardless of the evidence, you just simply could not vote to impose the death penalty? Is that what you are saying?

MR. DENT: I don't believe I could.

MR. BRITT: What was your answer?

MR. DENT: I said I couldn't.

COURT: Could not?

MR. DENT: Yes, sir.

MR. BRITT: For cause, your Honor.

COURT: Mr. Dent, you one time said you didn't know and you now answer that you could not. I want to be sure we understand

APPENDIX—Continued

you. You understand that if you were selected as a juror and if the jury found the Defendant guilty of First Degree Murder, you would then be called upon to consider any aggravating circumstances and any mitigating circumstances in a second part of the trial, and you would be called on to vote as to whether the sentence should be the death sentence or life imprisonment. Do you understand that?

MR. DENT: Yes.

COURT: Do you feel that under no circumstances, no matter how aggravating the evidence might be, that you could not under any circumstances vote for the sentence recommending the death sentence?

MR. DENT: I don't believe I could.

COURT: You may be excused.

MR. DENT EXCUSED.

Trial Transcript at 88–96.

jury would be called on to do in a case of this type?
MRS. BENJAMIN: Yes.

COURT: You think you understand that?
MRS. BENJAMIN: Yes, sir.

COURT: And do you feel, Mrs. Benjamin, that if it reached the phase of determining the sentence, that there are no circumstances that you can think of so aggravated that you would vote for the death penalty?
MRS. BENJAMIN: I can think of none, sir.

COURT: You may be excused.

MRS. BENJAMIN EXCUSED.

MR. JACOBSON: The defendant objects and excepts.
COURT: Noted.

This constitutes defendant Barfield's EXCEPTION NO. 15.

Mr. Merritt was examined again by Mr. Britt.

Mr. Britt examined Mrs. Burns, Mrs. Hester, Mrs. Tingle (Budd) and Mr. Dent.

Mr. Dent, where do you live?
MR. DENT: Bladenboro.

MR. BRITT: Are you a married man, sir?
MR. DENT: Yes, sir.

MR. BRITT: Do you have children?
MR. DENT: No, sir.

MR. BRITT: Mr. Dent, how do you feel about capital punishment, sir? Are you opposed to it or do you feel like it is a necessary law?
MR. DENT: I don't believe I could vote on death.

MR. BRITT: Are you saying then that you are opposed to the death penalty?
MR. DENT: I don't believe in it.

MR. BRITT: Don't believe in it?
MR. DENT: No.

MR. BRITT: Well, do you believe in any cases or some cases?
MR. DENT: I believe in some cases.

MR. BRITT: Well, it would have to be a special case. Is that what you are saying?
MR. DENT: Yes. I just don't believe in it.

MR. BRITT: Let me ask you this: Even though you believe in it in special cases, could you be a part of it in a special case, that is, could you sit on the jury and vote to return a judgment or recommendation to the court which would cause the death penalty to be imposed?
MR. DENT: I don't believe I could.

MR. BRITT: Under no circumstances?
MR. DENT: I don't believe I could.

MR. BRITT: Well, we are looking for a yes or no answer, if we can get it. Do you feel that you could serve on a jury and return a verdict of death or a judgment of death?
MR. DENT: I don't believe I could, no, sir.

MR. BRITT: Are you saying you couldn't do that under any circumstances?
MR. DENT: I don't know. It is the first time I have ever been in something like this.

MR. BRITT: Are you saying you could not do that regardless of the evidence?
MR. DENT: It is hard to do.

MR. BRITT: Sir?
MR. DENT: It would be hard to do.

MR. BRITT: I understand it would be hard to do. Are you saying you could not do it under any circumstances?
MR. DENT: I don't know.

MR. BRITT: Sir?
MR. DENT: I don't know.

MR. BRITT: Do you need a few minutes to think, Mr. Dent?
MR. DENT: I don't believe I could sit on it and do that.

MR. BRITT: Are you saying you could not sit?
MR. DENT: Yes.
MR. BRITT: Sir?
MR. DENT: Yes, sir.

MR. BRITT: And under no circumstances could you sit on a case in which the death penalty would be imposed. Is that correct?
MR. DENT: Yes, sir.

MR. BRITT: For cause, your Honor.

COURT: Let me say to the jurors who have just recently come in, as has been indicated, this is a case where First Degree Murder is charged; and the law of our state at the present permits the death penalty under certain circumstances where a person is found guilty of first degree murder. In the trial of this case, the jury will first hear evidence and determine whether the defendant is guilty of First Degree Murder or some lesser offense or not guilty of the crime. If she should be found guilty of First Degree Murder, then after the jury has returned its verdict as to guilt, there will be a later proceeding in which other evidence may be offered and from which the jury determines its recommendation as to sentence. The recommendation may be for the death sentence or it may be for life imprisonment.

You will be asked to consider whether aggravated circumstances exist sufficient to require the death sentence to be imposed, so that is the procedure this trial will take as it goes forward.

Now, Mr. Dent, if you understand or think you understand that explanation of what the law is and you are called on -- if the defendant was found guilty of First Degree Murder in the first stage of the trial, and you thereafter heard evidence as to any aggravating and mitigating circumstances that may affect the punishment, do you feel that there are any circumstances so aggravated that you could vote for the recommendation of the death sentence?

MR. DENT: I don't know.

COURT: You are not certain at this time?
MR. DENT: No, sir.

COURT: Do you think you understand the procedure that we will be going through and what the jury will be required to consider?
MR. DENT: Yes.

COURT: And do you believe that there may be aggravating circumstances sufficient that you could in certain cases vote for the death penalty, or do you know?
MR. DENT: I don't know.

COURT: To those four jurors, I will say there are people who favor the death penalty. There are people who oppose it and there are people who even though they oppose the death penalty as a matter of religious or moral scruples feel that they can follow the law that the legislature has provided and carry out their duty as a juror in spite of their personal feelings or convictions. Now, Mr. Dent, at this time I'm asking you do you feel that your scruples or convictions

about the death sentence are such that you could not, under any circumstances that you can imagine, vote for the death penalty?
MR. DENT: I don't know.

COURT: Do you feel you are able to say at this time?
MR. DENT: I don't.

COURT: Any other questions?

MR. JACOBSON: Mr. Dent, you could follow the law as handed down by the court in determining whether this defendant was guilty or innocent, could you not?
MR. DENT: Sir?

MR. JACOBSON: You could rule on whether she was guilty or innocent. You wouldn't have any problem with that part of the trial, would you?
MR. DENT: No.

MR. JACOBSON: You read the newspapers and listen to the radio, do you not?
MR. DENT: I listen to television. I havn't heard nothing about the case.

MR. JACOBSON: I am not talking about this case. You have heard of other murder cases, have you not?
MR. DENT: Yes, sir.

MR. JACOBSON: Probably a whole lot of them over your lifetime. I want you to think about the worst one you have ever heard about.

MR. BRITT: I object to that.
COURT: Overruled.

MR. JACOBSON: Are you thinking about the worst one you have ever heard about?
MR. DENT: Yes.

MR. JACOBSON: Could you render the death sentence in that case?
MR. DENT: Yes, sir.

MR. JACOBSON: Nothing further.

COURT: Challenge denied at this time.

MR. BRITT: All right. I take it, since you say you could render the death sentence in that case, if you sat on this jury and you were satisfied that this case was the type of case that you thought the death penalty should be imposed in, and you felt that way beyond a reasonable doubt, you could vote to impose the death penalty. Is that correct, Mr. Dent?
MR. DENT: Yes.

MR. BRITT: Sir?
MR. DENT: I reckon when I hear the case.

MR. BRITT: I understand that but if you were satisfied and satisfied beyond a reasonable doubt that this was the type of case in which the death penalty should be imposed, you would vote to impose it, would you not?
MR. DENT: I don't believe in capital punishment.

MR. BRITT: You don't believe in capital punishment. All right, sir. Let me ask you this: Are you saying that regardless of the circumstances and regardless of the facts you just simply could not vote to impose the death penalty for anybody? Is that what you are saying, sir?

MR. JACOBSON: Objection. He answered it.
COURT: Overruled.

MR. DENT: I don't believe in it.

MR. BRITT: I know that. You say you don't

believe in it. Is that based on moral or religious scruples that you have, sir?
MR. DENT: I just don't believe in it.

MR. BRITT: Is your feelings so strong that regardless of the circumstances and regardless of the evidence, you just simply could not vote to impose the death penalty? Is that what you are saying?
MR. DENT: I don't believe I could.

MR. BRITT: What was your answer?
MR. DENT: I said I couldn't.

COURT: Could not?
MR. DENT: Yes, sir.

MR. BRITT: For cause, your Honor.

COURT: Mr. Dent, you one time said you didn't know and you now answer that you could not. I want to be sure we understand you. You understand that if you were selected as a juror and if the jury found the defendant guilty of First Degree Murder, you would then be called upon to consider any aggravating circumstances and any mitigating circumstances in a second part of the trial, and you would be called on to vote as to whether the sentence should be the death sentence or life imprisonment. Do you understand that?
MR. DENT: Yes.

COURT: Do you feel that under no circumstances, no matter how aggravating the evidence might be, that you could not under any circumstances vote for the sentence recommending the death sentence?
MR. DENT: I don't believe I could.

COURT: You may be excused.

MR. DENT EXCUSED.

No. 83-6610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARGIE BULLARD BARFIELD,
Petitioner,

v.

KENNETH W. HARRIS, et al.,
Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, MARGIE BULLARD BARFIELD, who is now imprisoned in the custody of the North Carolina Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state and federal courts below. Petitioner has attached hereto her affidavit in substantialy the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully Submitted,

Richard H. Burr, III

RICHARD H. BURR, III
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

Counsel for Petitioner

ORIGINAL

No. 83-6610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARGIE BULLARD BARFIELD,
Petitioner,

vs.

KENNETH W. HARRIS, et al.,
Respondents.

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, MARGIE BULLARD BARFIELD, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [✓]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

_____

_____

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received. Retired Nursing Care - Nursing Home — Lumberton, N.C. mar. 78

2.60 an hr.

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes [ ] No [ ]

b. Rent payments, interest or dividends? Yes [ ] No [ ]

c. Pensions, annuities or life insurance payments? Yes [ ] No [ ]

d. Gifts or inheritance? Yes [✓] No [ ]

e. Any other sources? Yes [ ] No [ ]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. $345.00

3. Do you own cash, or do you have money in a checking or saving account? Yes [ ] No [✓] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [✓]

If the answer is "yes" describe the property and state its approximate value. _____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. None

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

Margie Bullard Barfield
Signature of Petitioner

STATE OF NORTH CAROLINA)
COUNTY OF _____)

MARGIE BULLARD BARFIELD being first duly sworn under oath, presents that she has read and subscribed to the above and states that the information therein is true and correct.

Margie Bullard Barfield
Signature of Petitioner

SUBSCRIBED and SWORN to before me this 11 day of April, 1984.

A. Elaine Word
NOTARY PUBLIC

My Commission Expires: March 12, 1986

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

****

NO. 83-6610

****

MARGIE BULLARD BARFIELD,

Petitioner,

v.

KENNETH W. HARRIS, Superintendent,
North Carolina Correctional Center
for Women, and RUFUS L. EDMISTEN
State of North Carolina,

Respondents.

****

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

RUFUS L. EDMISTEN
ATTORNEY GENERAL

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State of North Carolina,

Respondents.

****

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

OPINION BELOW

JURISDICTION

QUESTIONS PRESENTED

Pursuant to Rule 34 of the Rules of the Supreme Court, these items are omitted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by petitioner, the North Carolina statute criminalizing murder is NCGS §14-17 which, at the time petitioner was tried and convicted, read in part as follows:

> §14-17. Murder in the first and second degree defined; punishment. A murder which shall be perpetrated by means of poison, lying in wait,

imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, shall be deemed murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to GS §15A-2000.

STATEMENT OF THE CASE

Pursuant to Rule 34 of the Rules of the Supreme Court, this item is omitted.

ARGUMENTS IN RESPONSE TO THE REASONS ASSERTED FOR GRANTING THE WRIT

I

PETITIONER'S CLAIM OF A SANDSTROM VIOLATION IS SUBSTANTIVELY INCORRECT AND THEREFORE THE CRITERIA FOR SEEKING REVIEW ON WHICH SHE RELIES - FAILURE OF THE NORTH CAROLINA SUPREME COURT TO FOLLOW THIS HONORABLE COURT'S DECISIONS - IS INAPPLICABLE.

Petitioner first seeks a writ of certiorari on the grounds that there was a Sandstrom violation because (i) North Carolina's statute penalizing murder removes premeditation and deliberation as an issue if the jury finds the killing was perpetrated by poisoning, (ii) premeditation and deliberation are commonly understood as referring to a murder carried out with the intent to kill, and (iii) the jury therefore might have taken the trial judge's instruction that premeditation and

deliberation were deemed to exist as also meaning the different element of intent to kill was also deemed to exist. This does not provide a basis for issuing the writ.

First, this issue was waived under North Carolina law to respondents way of thinking, by not presenting it on direct appeal, although the District Court and the Court of Appeals held there was no waiver. While it is true that on post-conviction review the trial judge substantively reviewed this complaint, the Supreme Court denied certiorari to review the trial court decision without giving any reasons. In view of this, a finding of waiver would have been a correct application of law here and it should be presumed that this is what occurred, see e.g. Edwards v. Jones, 720 F.2d 751 (2nd Cir. 1983), Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983), Rollins v. Maggio, 711 F.2d 592 (5th Cir. 1983).

Second, no Sandstrom problem arises here. Petitioner concedes that Judge McKinnon instructed the jury that they were to find beyond a reasonable doubt that petitioner had the intent to kill and this concession is borne out by the instructions recited on page ten of the petition. Her basis for arguing that the jurors could have reasonably disregarded this express instruction and made the associations mentioned in (ii) above rests on the suppositions that the jurors knew other North Carolina case law which somewhat

mingles the concepts and knew complete dictionary definitions doing the same and from this knowledge elected to disregard the express instructions given them on this without even raising a question about it. This is no more likely to have happened here than in any other case in North Carolina in which these or other related concepts have been used. Hopefully, bare possibilities and presumptions of bad faith are not the stuff that constitutional violations are made of, for if they are, all of North Carolina's first and second degree murder convictions will go down the drain, as well as those of other jurisdictions using common law or common law-like definitions of criminal homicides. Parenthetically, just this term, the Court dismissed for want of a substantial question the case of Santiago v. Pennsylvania, _____ US _____, 78 LEd2d 72, 104 S.Ct. 52 (1983), a case challenging the related situation of felony murder being used as a substitute for malice. Presumably the same problem would have arisen in that case. For these reasons, then, a writ of certiorari should not be granted to petitioner.[1]

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[1]Petitioner spends four pages of text discussing harmless error vis a vis Connecticut v. Johnson, _____ US _____, 78 LEd2d 823, 103 S.Ct. 969 (1983), a first mention in this case. Respondents do not believe that it is necessary for the Court to reach petitioner's somewhat complicated analysis because there was no Sandstrom error in the first place. In passing, however, Judge Murnaghan noted during oral argument below that petitioner's story that she did not mean to kill her victim gets pretty old after five homicides.

II

PETITIONER'S CLAIM OF A LOCKETT VIOLATION IS SUBSTANTIVELY INCORRECT AND THEREFORE THE CRITERIA FOR SEEKING REVIEW ON WHICH SHE RELIES - FAILURE OF THE NORTH CAROLINA SUPREME COURT TO FOLLOW THIS HONORABLE COURT'S DECISIONS - IS INAPPLICABLE.

Petitioner next seeks a writ of certiorari on the ground that her death penalty was imposed under circumstances where the instructions may have permitted the jury to disregard mitigating circumstances. The basis for this argument is that the jury may have weighed the aggravating circumstances alone in determining whether they were substantial enough to justify the death penalty, rather than considering them as discounted by the effect of any mitigating circumstances. As petitioner notes, this issue is one which has concerned Mr. Justice Stevens at one point. Nevertheless it does not justify the issuance of a writ of certiorari.

First, the same waiver that occurred on the first issue occurred on this one. Second, as petitioner notes, there were no mitigating circumstances found - two express ones were submitted and expressly rejected by the jury while the omnibus "any other factor etc." was not answered one way or the other. Third, the Barclay and Zant cases[2] have largely answered the arguments posed here by holding that

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[2] _____ US _____, 77 LEd2d 1134, 103 S.Ct. 3418 (1983); _____ US _____, 77 LEd2d 235, 103 S.Ct. 2733 (1983).

the channeling of jury discretion on imposing the death penalty can be handled in several ways so long as the unbridled discretion found unconstitutional in Furman v. Georgia, 408 US 238,, 33 LEd2d 346, 92 S.Ct. 2726 (1972) is not present, which it is not here. Although, as petitioner notes, North Carolina has now opted for a discounting approach which, in her case, the jury may or may not have used under the instructions given them, even if it did not, the only reason petitioner offers why this would constitute cruel and unusual punishment is the use of a single word, "independent", in Lockett v. Ohio, 438 US 586, 57 LEd2d 973, 98 S.Ct. 2954 (1978). Lockett, however, dealt with a completely different question - the large-scale exclusion of articulable, relevant factors. This did not happen here and a sense of simple feeling leads to a correct result on petitioner's argument, showing as it does that there is simply nothing cruel and unusual about the analytical method petitioner says may have occurred here, assuming of course that the death penalty itself is not cruel and unusual, an issue long since decided in the negative. Finally, the concern expressed by Mr. Justice Stevens that the death penalty is only constitutional if the jury considers it the appropriate punishment no matter what, does not seem to be met by the choice of one of the systems above over the other. While in theory the discounting system might be more helpful to an accused in a given case, in petitioner's case this is speculative in the

extreme since, as noted before, no mitigating circumstances were ever found. Beyond this, however, it is hard to see how anything but a return to the pre-Furman discretion could ever wholly achieve the situation mentioned by Mr. Justice Stevens. For these reasons, a writ of certiorari should not be granted on this issue.

III

PETITIONER'S CLAIM OF A WITHERSPOON VIOLATION IS SUBSTANTIVELY INCORRECT AND THEREFORE THE CRITERIA FOR SEEKING REVIEW ON WHICH SHE RELIES - A CONFLICT BETWEEN THE CIRCUITS - IS INAPPLICABLE HERE.

Petitioner next seeks a writ of certiorari on the ground that prospective juror Dent was wrongly excluded under Witherspoon v. Illinois, 391 US 510, 20 LEd2d 776, 88 S.Ct. 1770 (1968). This Court has previously denied certiorari on this issue, Barfield v. North Carolina, 448 US 907, 65 LEd2d 1137, 100 S.Ct. 3050 (1980) and, of course, it has not found favor on collateral review in the federal courts either. On the assumption that what was good enough in the past is good enough now, especially since petitioner's current lawyer, Mr. Burr, was on the prior petition, respondents will attach and primarily rely on their prior response.

Supplementing the above however, petitioner's attempt to gain review by claiming a split in the Circuits on a test for the "I don't believe (think) I could" type of response fails because Judge Dupree relied on the Fifth and Eleventh Circuit and District Court law (App 99(a)).

Her attempt to state the rule for the other Circuits in terms of their requiring at least one absolute statement of "I will not", is not supported by the cases cited as they do not indicate any such analysis was made in them or any such rule yielded by them. Certainly nothing in Witherspoon would require that special level of, content of, or prerequisite to, proof, although where such a response appears, it obviously makes a finding of juror inappropriateness easier. Parenthetically, however, as respondents read one of Mr. Dent's later answers, it was "I could not" when asked the relevant question (App 118(a)). For the reasons above, a writ of certiorari should not be granted on this issue.

IV

PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS SUBSTANTIVELY INCORRECT AND DOES NOT INVOLVE THE SAME THINGS AS WASHINGTON V. STRICKLAND, 693 F.2d 1243 (11th Cir. 1982) AND THEREFORE THE CRITERIA FOR SEEKING REVIEW ON WHICH SHE RELIES - AN IMPENDING, RELEVANT EXPLICATION OF THE LAW OF INEFFECTIVE ASSISTANCE OF COUNSEL - IS INAPPLICABLE HERE.

Petitioner finally seeks a writ of certiorari on the issue of ineffective assistance of counsel claiming her lawyer, Bob Jacobson, mishandled her psychiatric defense and failed to investigate a "prior good character" type of defense. Neither of these represents a substantial charge against counsel and the first is so weak that it has to be

beefed up by epithitical language e.g. counsel's activities being a "flurry" and counsel having "never understood" this or that, while the second omits the salient (and to respondents, conclusive) fact that petitioner participated in the decision to limit the mitigation evidence to her drug abuse and personality problems. Under these circumstances, issuance of a writ of certiorari is not justified.

With regard to the first, petitioner had a ten year history of drug abuse and psychiatric treatment and therefore counsel put on five doctors, three pharmacists, petitioner herself and two of her relatives to testify to this. Although the doctors could not say she was legally insane at the time of the crime or trial, counsel had little else to do as the district attorney turned down his offer to plead petitioner guilty in exchange for five consecutive life sentences. His hope from all this evidence was that the jury might have a reasonable doubt on intent to kill and thereby convict petitioner of second degree murder but, if not, it might then find the evidence showed the mitigating circumstances of emotional or mental disturbance, or impaired capacity (PCHT p 219-224).[3] Preparatory to this, Mr. Jacobson cross-examined the state's witnesses along the above lines and expected petitioner's

[3]The post-conviction hearing transcript pages referenced in this argument are attached as an addendum to this brief, utilizing the original page references.

testimony to show remorse and pain as per their rehearsals (PCHT p 106-111, 233, 236-238). She double crossed herself, however, by arguing with the district attorney, admitting to acts at odds with her claim of drug intoxication at the time and even made silent applauding motions at the conclusion of the district attorney's argument. So much for that strategy and one must agree with Mr. Burr, that in one sense, Mr. Jacobson did not understand his client.[4]

The main complaint against Mr. Jacobson is that he did not keep looking after the third psychiatrist gave him a negative report on insanity and, if he had, he might have found Dr. Selwyn Rose 150 miles away, who was then a recent West Coast emigré and often testifies that those facing the death penalty were not insane at the time of the crime. However, those courts considering the argument that counsel has to keep looking have rejected it, see e.g. Bradbury v. Wainwright, 658 F.2d 1032 (11th Cir.), cert. denied, 456 US 992, 73 LEd2d 1288, 102 S.Ct. 2275 (1982); and at petitioner's post-conviction hearing, the bottom line of Dr. Rose's testimony was that he could not say whether or not she was insane at the time (App 64a, 65a). He offered

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[4]The reference to Mr. Jacobson not understanding "the critical importance of having his client talking openly and honestly with her psychiatrist" is a reference to petitioner's refusal to talk to one of them (PCHT p 213-214) and does not square with Mr. Jacobson's testimony (PCHT p 100-101). The allusion to unread medical records is true (PCHT p 229-230) but Mr. Burr has read them and he has never in one of the six stages he has appeared for petitioner pointed to anything in them "which would have lead him to question further the fairness and completeness of the evaluations of Ms. Barfield" Pet. p 31.

only the opinion that she did not have a "clear understanding" of her actions. However, petitioner testified that she knew what she was doing - she was trying to make her victim sick so that he would not have her arrested for her forgeries of his checks. In sum, Mr. Jacobson is being faulted for not pursuing conflicting theories before the jury.

With regard to the second matter above, not developing evidence of petitioner's prior good character ten years before, this was not explored much at post-conviction hearing by petitioner's lawyers. The uncontradicted evidence elicited by Mr. Burr at post-conviction hearing, however, does show that petitioner, her family and Mr. Jacobson jointly decided to limit her mitigating evidence to the problems she had faced during the past ten years and this was after he had interviewed several of the people petitioner relied on at post-conviction hearing (PCHT p 82-84, 120-123, 231-232). Failure to do the same thing was held not to constitute ineffective assistance of counsel in Gray v. Lucas, 677 F.2d 1086 (5th Cir.), cert. denied, US , 76 LEd2d 815, 103 S.Ct. 1886 (1983) and the remoteness of this type of proof in petitioner's case certainly makes the Gray decision on this the expected one.

Finally, the fact that Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1982) is currently before the Court on certiorari sub. nom. Strickland v. Washington, does seem to respondents to require a hold up on this petition. Of four issues reported at 34 CrL 4028 to have been the subject

of this petition, the only one at all related to this case is the issue of what showing of prejudice is required on an ineffective assistance of counsel claim. Strickland's outcome will not affect petitioner's case because both the standards involved in Strickland are higher than that normally employed in the Fourth Circuit and because in petitioner's case, both investigations not undertaken there - psychiatric and "prior good character" - were undertaken although, as previously noted, the latter was dropped with petitioner's consent. Given the foregoing, a writ of certiorari should not be granted to review this issue.

CONCLUSION

None of the four issues raised by petitioner merit this Court's attention under the normal guidelines governing this Honorable Court's decision on whether or not to issue a writ of certiorari, S. Ct. Rule 17. Accordingly, respondents urge the Court to deny same.

This 30 day of April, 1984.

Respectfully submitted,

RUFUS L. EDMISTEN
ATTORNEY GENERAL

Richard N. League
Special Deputy Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

(919) 733-2011

CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed postage prepaid and addressed as follows to:

Mr. Richard H. Burr, III
224 Datura Street -- 13th Floor
West Palm Beach, Florida 33401

Mr. James D. Little
Attorney at Law
P. O. Box 991
Raleigh, North Carolina 27602

This 30th day of April, 1984.

Richard N. League
Special Deputy Attorney Genereral

ADDENDUM A

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1979

NO. A-617

MARGIE VELMA BARFIELD,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE OF STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR CERTIORARI.

RUFUS L. EDMISTEN
Attorney General
Richard L. Griffin
Assistant Attorney General
North Carolina Dept. of Justice
P. O. Box 629
Raleigh, North Carolina 27602
919/733-6012

COUNSEL FOR RESPONDENT

May 2, 1980

The defendant, in her petition, twice accuses the North Carolina Supreme Court of failing to give a fair review "in its rush to issue its first affirmance of a death sentence under the current North Carolina death penalty statute." (Petition p. 9). In rebuttal of this accusation, the State shows that of the five death sentence cases reviewed so far by the North Carolina Supreme Court, four have been set aside for errors committed in the sentencing phase. The cases of GOODMAN, supra, JOHNSON, supra, and CHERRY, supra, preceded this case and the case of STATE v. DETTER, 298 NC 604, 260 SE 2d 567 (1979), followed this case. Only the case at hand has been found to be error-free. Such a record shows how careful and meticulous the North Carolina Supreme Court has been in discharging its review function. The accusation cannot withstand the truth which appears from the record.

In summary of the State's brief defense to the defendant's attack on the three aggravation issues, the State contends that (1) there are adequate, independent facts to support each issue, (2) prior North Carolina cases have adopted interpretations that add proper guidance to the general issue of "especially heinous, atrocious or cruel" which interpretation has been approved by this court in PROFITT, supra, (3) the trial judge instructed the jury in keeping with the interpretations, (4) the jury answered written issues of aggravation and mitigation, (5) the jury answered all three aggravation issues against the defendant and found no mitigation, (6) aggravation as found outweighed mitigation in which instance the jury had no discretion to impose a life sentence, (7) and the defendant exercised her automatic right of appeal to the North Carolina Supreme Court as to errors of law and propriety of punishment which court properly exercised its powers. The defendant has been condemned to death in accordance with constitutional procedures.

B. WAS THE CONSTITUTIONAL PROCESS RESPECTING CHALLENGE FOR CAUSE FOR OPPOSITION TO THE DEATH PENALTY, AS SPECIFIED BY THE WITHERSPOON DOCTRINE, FOLLOWED DURING SELECTION OF THE PETIT JURY?

GS 15A-1212 sets forth the various grounds for challenge for cause of a prospective juror. The statute, in part, reads as follows:

> "A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> (a) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina."

The WITHERSPOON rule, as enumerated in WITHERSPOON v. ILLINOIS, 391 US 510, 20 L.ed. 2d 776, 88 S.Ct. 1770 (1968) and supplemented in such cases as DAVIS v. GEORGIA, 429 US 122, 50 L.ed. 2d 339, 97 S.Ct. 399 (1976), specified that where a death sentence has been imposed it cannot stand if the veniremen have been improperly challenged for cause based upon a belief concerning the death penalty. The rule as to the propriety of challenge is stated in DAVIS, at page 123, with this language:

> "...Unless a veniremman is irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings (citation omitted) he cannot be excluded: if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand."

The North Carolina statute is basically a modification of the WITHERSPOON rule and is routinely followed in North Carolina. Indeed, in this case, prior to jury selection, the trial judge announced that he would follow the WITHERSPOON rule (Rp 71).

Veniremman Dent was successfully challenged for cause by the State as a result of his belief concerning the death penalty. A somewhat extended inquiry was made into his beliefs by the District Attorney, defense counsel, and the trial judge with these results: he believed he could sentence to death in some cases (one time; Rp 85); could impose death in worst case (two times; Rp 88); it would be hard to do (two times; Rp 85); doen't know (six times; Rpp 85, 86, 87, 88); doesn't believe he could vote on death (five times; Rpp 84, 85, 90); doesn't believe in death penalty (six times; Rpp 85, 89, 90); doesn't believe he could under any circumstances (one time; Rp 85);

doesn't believe he could return a verdict of death (two times; Rpp 85, 86); could not sit (one time; Rp 86); under no circumstances (one time; Rp 86).

During first questioning by the District Attorney, Venireman Dent said that under no circumstances could he sit on a death case. Hence he was challenged for cause. However, upon questioning by the trial judge he said he didn't know and upon questioning by defense counsel said he could, so the challenge was denied (Rp 89).

Upon reexamination by the District Attorney, Venireman Dent said he couldn't impose the death penalty; hence he was again challenged for cause. This time, upon examination by the trial judge, he said "I don't believe I could" and the challenge was allowed (Rp 90).

Granted, Venireman Dent inconsistently answered questions about and the relative strength of his belief; however, overall the clear impression is that he opposed the death penalty with sufficient conviction that he could not sit and render a death sentence in any case. When a venireman has answered questions concerning his fitness inconsistently on 26 occasions, it is suitable for the trial judge to exercise the wisdom of his insight. Having just said "I couldn't," the answer "I dont believe I could" to the judge's question is subject to an interpretation to mean "I couldn't."

In addition to the current case, North Carolina has permitted overall interpretation of the venireman's belief in other cases. STATE v. BERNARD, 288 NC 321, 218 SE 2d 327 (1975); STATE v. SIMMONS, 286 NC 681, 213 SE 2d 280 (1975); STATE v. AVERY, 286 NC 459, 212 SE 2d 142 (1975), death sentence vacated 428 US 904, 96 S.Ct. 3209, 49 L.ed. 2d 1209 (1976). Other states have concurred. In TEZENO v. STATE, 484 SW 2d 374 (Tex. 1972), the Texas court wrote:

> "We cannot believe that WITHERSPOON...requires certain formal answers and none others. We surely feel that the test of WITHERSPOON is 'not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality....'"

The State contends that the WITHERSPOON doctrine as updated and modified was applied in the current case and that Venireman Dent was properly challenged for cause as found by the North Carolina Supreme Court.

CONCLUSION

The State contends that the Federal questions presented in the Petition for Writ of Certiorari had been previously determined by this court and that the decision in this case by the North Carolina courts has been in accord with applicable decisions of this court. Accordingly, the State respectfully says that the Petition for Writ of Certiorari should be denied.

Respectfully submitted, this the 2nd day of May, 1980.

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ADDENDUM B

COURT: OVERRULED. You may answer if you understand the question.

A. The only problem that I can think of occurred after the case was tried and not before.

Q. In the course of preparing the defense for Mrs. Barfield, you talked to a number of witnesses. Is that correct?

A. Yes sir, I did.

Q. Can you tell me the witnesses aside from the psychiatrists that you talked to in preparation for the trial?

A. I talked to many of her family members.

Q. Can you tell me who?

A. It would be at least three of the four seated on the front bench. Her daughter and her son-in-law, her brother Earl Matthews, her son Ronald Burke, all the doctors that were called as witnesses. Mrs. Hayes from Belk's who is now the Parole Officer or Probation Officer or--I guess she works for the prison system. I talked with a lady who was involved in the church and her husband who was the minister or pastor of that church. They had moved out of town. I believe I talked to some people over at United Care which is now Modern Care.

Q. Do you recall who you talked to there?

A. I don't remember the names right now. I think one of them was named Burchette, Barbara Burkette, or something like that. I know that I was looking for witnesses and I think they had told me that they didn't know her long enough. I think they

were people in the nature of character witnesses. Now, there is one name that has me a little puzzled. I think I talked with Mr. Geddie who worked at Belk's. I know I issued a subpoena for him, I know I had a telephone number for him, but I know that he didn't testify. So something makes me think that I may have talked to him and decided not to call him but I have no independent recollection of that right now.

Q Was that subpoena for Mr. Geddie issued on November 24, a Friday before the trial started on Monday?

A I do not remember when it was issued. Whatever the file says that is probably correct.

Q Is there anyone else that you talked to?

A Well, there may have been but I just don't recall right now. Of course, I talked to the defendant a number of times.

Q Would it be indicated in your file if you talked to anybody, would you have made notes of it? People that you talked to?

A It would not be indicated by list or notes, no, I don't think so.

Q Would their names be in your file that you talked to them?

A I think primarily it's limited to the ones I told you about.

Q That would be Mrs. Hayes, the minister and his wife, and Mrs. Burchette ---

A The minister and his wife would be Sylvia Long and I don't

remember her husband's name.

Q. Reverend and Mrs. Long, Mrs. Burchette and possibly ---

A. Possibly somebody else.

Q. Possibly Mr. Geddie?

A. No, possibly somebody else at United Care whose name I don't recall right now. Possibly Mr. Geddie.

Q. And then you mentioned members of the family that you said was seated on the front row ---

A. Right back of you, right, right now. I talked with Gwen Bullard who I did not mention to you who is a sister-in-law, I believe, of Mrs. Barfield. I talked to her in my office alone probably a number of times. I believe she resides in South Carolina somewhere.

Q. Did you talk to ---

A. I also went up to the Chief Medical Examiner's office up in Chapel Hill and talked to some people up there. I talked to a number of pharmacists about the effects of drugs and I think I called a number of them as witnesses, and I may have talked to some that I didn't call as witnesses.

Q. You called pharmacists from Chapel Hill?

A. No,these are pharmacists around Lumberton.

Q. Pharmacists that Mrs. Barfield had gotten prescriptions from?

A. Yes.

Q. Are there any other witnesses that you can think of that

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Velma Barfield?

A. I do not have any indication on my time slips that I spoke to her in the next couple of days although I may have. I don't vouch for the complete accuracy of the time statement.

Q. Let me ask you this, Mr. Jacobson, do you recall when she was sent to Dorothea Dix?

A. Somewhere around the 16th or 17th of March.

COURT: Would you repeat that date, please? I didn't hear you.

A. Somewhere around the 16th or 17th of March of 1978.

Q. Did you see her from the day that you were appointed there in Court until the time that she left to go to Dorothea Dix a day or two later?

A. I may have but I don't have any independent recollection. There is nothing in the time sheet that would refresh my recollection.

Q. Did you then see her at Dorothea Dix?

A. I spoke to her on the phone before I saw her at Dorothea Dix. I've got a notation here on the 4th of April I talked with her, and then again when I went to Raleigh on the 21st I did see her up at Dorothea Dix.

Q. Do you recall the substance of your conversation with her on the 4th of April?

A. I think generally it was a conversation about how she was getting along and I was instructing her to cooperate with the

doct and do the best she could under the circumstances.

Q. Now, on the 21st of April you've indicated that you saw her at Dorothea Dix. Is that correct?

A. Yes, I think so.

Q. Do you recall how long you spoke to her at that time?

A. It wasn't very long I don't think. It couldn't have been over fifteen minutes to half an hour. It may have been less. I did most of my talking with Dr. Rollins.

Q. Now, do you recall the substance of your conversations with her on the 21st of April?

MR. BRITT: OBJECT.

COURT: OVERRULED.

A. No, I do not. Again, probably it was about how she was doing and how they were treating her up there at Dorothea Dix, and again encouraging her to cooperate with the doctor.

Q. Do you recall the next time that you saw her?

A. Yes, it was on May the 1st. It was a trip to the jail and conference with the defendant.

Q. Do you recall the substance of that conversation?

MR. BRITT: OBJECT.

COURT: OVERRULED.

A. The conference that we had probably was in relationship to the up-coming arraignment and what was going to happen at the arraignment and what motions we were going to file and what we were going to do with regard to changing the venue of the

we did.

Q Is there any day prior to trial that you can talk, that you know of that you specifically talked to her about testifying?

A I cannot specifically pinpoint a day when I said, Mrs. Barfield, I've decided that you are going to testify.

Q Is there a day that you can specify, or days, that you can specify and say that you discussed with her the facts of her testifying and what her testimony would be?

A We did on a number of occasions discuss and practice what her testimony was going to be and these were the days that I saw her which were pretty much close to when the trial was going to be.

Q So that would have been later than October 20th?

A I'd say October 20th was a good starting date and I think from that date on we probably started practicing.

Q When was the next time that you saw Mrs. Barfield after October 20th?

A I have down here a conference of November 6, 1978 but I don't have anything beside of it. That may have been the next time I saw her. It doesn't specifically set out conference with whom and I would just, assuming that is when, that was the time I may have gone over to the jail to see her. On November 15th I do have a conference with the defendant. On November 16th I do have conference with the defendant, and on

November 18th I have interview with defendant. On November 22 I have interview with defendant, and starting about there just about every day I spent time over at the jail.

Q For what purpose?

A To prepare her for testifying and to give her information about how the trial was going to be conducted.

Q Could you relate those conversations to the Court?

A I think we were practicing her testimony.

Q How did you do that?

A By going over it and asking questions and she would answer them.

Q What kinds of questions?

A The same ones I put to her in the Trial Transcript basically.

Q Did you find it necessary to go over the same question at different times in order to assure yourself that she would be a good witness?

MR. BRITT: OBJECT to the form. Well, OBJECT to it altogether.

COURT: OVERRULED.

A I counseled her on trying to be, and appear to be, a sympathetic witness. I wanted her to look like somebody's mother. Here was this poor lady and look what she was going through and I wanted her to evoke sympathy, and I counseled her about the manner in which she testified and that she could very much help herself in this regard in the manner that she testified

and very frankly, I was afraid that she was going to get in an argument with Joe Freeman Britt and look very very bad. My fears came to pass, and she did. I talked to her many times immediately prior to the trial and during the trial that when she testified I wanted her to cry. I thought that would be very helpful and I thought that would get a great deal of sympathy, and at no time did she do that. In fact, she just seemed to stick her chin out and just wanted to go at it with the District Attorney and I was very disappointed but that is not to say that I didn't counsel her on how to testify. I wanted her to cry very much, and she did not.

Q What was there about her that made you think that she and Joe Freeman Britt would go at it, as you say?

A Because every time that we got together, she wanted to argue with me about the cause of death of all the decedents. She was not satisfied in her mind that the arsenic had caused the death and we ourselves would argue about it, and I was afraid that she was going to do that, and that is what she did. She would get a little bit argumentative.

Q And this argument about the cause of death, does that relate to Stewart Taylor or the others also?

A All of them.

Q Did you know at the time that you were talking to her about testifying that the other deaths would be admitted or that Mr. Britt would seek to admit them?

A I knew that he was going to try, yes. I was familiar with all the cases that say they can be used to show intent, motive scheme, plan, design, et cetera, modus operandi.

Q So it was,---Strike that. When you talked to her about testifying, did you talk to her about the other deaths also?

A Yes. I secured copies of all of her statements which told of all the deaths. I secured copies of all the death certificates. The only thing I couldn't get was the medical examiner's reports. There is something peculiar about the law that he couldn't let those other deaths, those reports out without a Court Order, and there was no charges in those cases. So I wasn't able to get the Order.

Q When you say he couldn't release them, who are you talking about?

A Page Hudson.

Q Now, did you talk to Mrs. Barfield during this period before trial about the potential cross examination?

A Yes.

Q Can you tell me what you did in that regard?

A I told her that Joe Freeman was going to try and make her look real bad and she was going to have to be in control of herself.

Q Did you tell her anything else in that regard?

A Well, I think I discussed that she was going to be asked about all of the deaths and how she administered the poison

and that sort of thing. Basically I wanted her to be able to tell about her drug habit. That was the purpose in practicing so that she would be ready not only for my examination but for Mr. Britt's cross examination. And I do that not only with her but will all of my contested cases.

Q After all of your conversations with her, up until the time that you had put her on trial, until you put her on the Stand or until she took the Stand to testify, did you continue to feel that there was a danger that she and Joe Freeman Britt quote, would go at it?

A Yes, I felt that way and that was why we had our conferences so I could prepare her for it and ask her to look sympathetic.

Q What was the purpose in putting her or having her testify? Could you tell me your purposes in having her testify?

A To show that she took all of these drugs and that she was more or less a poor person, a person that did not come from a real rich family but kind of had to struggle to get by and that she had seen many many doctors and she had a problem with the doctors over prescribing the various drugs and that she took them against their wishes and against their prescriptions and in combination.

Q After her direct testimony on the Stand, were you satisfied in your own mind that you had elicited that information that you sought to get from her?

A 'sing her and the doctors I felt like we had done pretty

well about getting that sort of information in the record especially when the Court admitted into evidence all those pill bottles. I was very satisfied with that.

Q When had Ronald Burke gotten you those pill bottles?

A Very early in the case. He had a grocery sack, he brought in a grocery sack full of them, and it may have been forty or fifty pill bottles.

Q During the time of trial, I believe the trial started on Monday, is that right?

A Yes.

Q And ended on a Saturday?

A Saturday at eight o'clock.

Q Did you have conversations with Mrs. Barfield outside the Courtroom concerning the trial?

A Yes sir.

Q And starting with Monday, can you relate those to me?

A I cannot relate all of them to you. I know that we did have conversations during the breaks and before the trial.

Q Was there anything in the conversations that you had with her relating to the witnesses that were about to be called?

A I don't remember. On the breaks and before trial I did spend a good bit of my time trying to line people up to be where they were supposed to be. Also the first several days were taken up with jury selection. So I don't know if we would have had much conversation about the case in chief on

MR. BRITT: OBJECT for the same reason.

COURT: SUSTAINED.

Q Did you consider using any of her brothers and sisters in the sentencing phase?

MR. BRITT: OBJECT.

COURT: OVERRULED.

A I believe I used Earl Matthews. I don't remember whether I used him on sentencing or on guilt or innocence. I believe I used him on guilt or innocence.

Q This is her son-in-law?

A No. I'm not quite sure how Earl is related. Earl is related but he is the one that I used. A lot of the family members didn't want to testify.

Q Who is that, which ones didn't want to testify?

A Well, I had asked Ronald and Kim to help me get family members who wanted to help out on this and they said the family wasn't really interested because she had killed their mother. Now, whether I can point the finger at one in particular, I cannot do that and I wouldn't want to really.

Q Did you yourself talk to any of Velma's brothers and sisters about testifying?

A I know I talked to her brothers and sisters but I don't know whether I talked to them about testifying. I talked to Jesse and I talked to Tyrone, I believe, and, of course, I. talked to Earl Matthews. I am not sure how Earl is related.

Q Did you talk to Jesse and Tyrone in terms of explaining the case to them or in what context did you talk to them?

A I don't remember.

Q Do you know anything about,at the time of the trial, did you know anything about Velma Barfield prior to the time that her first husband was an alcoholic and she began using drugs as she testified to?

A I don't know that I knew that much about anything prior to her first husband.

Q Do you know if you talked to her daughter and son, Kim and Ronald, about what she was like before she started using drugs?

MR. BRITT: OBJECT.

COURT: SUSTAINED.

MR. LITTLE: Your Honor, may I be heard briefly?

COURT: Can you re-phrase the question?

MR. LITTLE: Yes sir.

Q Did you talk to Ronnie and Kim about Velma Barfield's background prior to approximately 1968?

MR. BRITT: OBJECT.

COURT: OVERRULED.

A We talked primarily about her situation since the death of her first husband because that was when all of her problems began, and I was advised that that was when all her problems began, that she was a pretty good person before that

but everything seemed to go downhill from that time.

Q Did you talk to any of Velma Barfield's brothers and sisters about her background prior to approximately the time when her first husband died?

A I don't believe I did.

Q Did you talk to any of the people that knew Velma Barfield during the period that she lived in Parkton?

MR. BRITT: OBJECT without some sort of predicate.

COURT: Re-phrase it.

Q Did you talk to any of the people who lived in the Parkton area about Velma Barfield ---Your Honor, I've lost myself on that one. Did you talk to any of the people in Parkton that knew Velma Barfield about her?

MR. BRITT: OBJECT.

Q About her background.

COURT: With reference to what? Please start your whole question again so we can comprehend it.

Q First of all, did you talk to anybody in Parkton about Velma Barfield?

MR. BRITT: OBJECT. To broad.

COURT: OVERRULED. What is your answer?

A I don't know that I did. I may have but I don't believe I did.

Q Do you know what Velma Barfield's employment record was from approximately 1957 to the time of her arrest in 1978?

MR. BRITT: OBJECT from 1957.

COURT: OVERRULED. He may answer if he knows.

A. I believe I know her employment record from '68 on.

Q. And what is that?

A. I know she worked at Belk's and I know she worked at United Care and I know she worked as a household keeper for various people taking care of elderly people. I can't put it in sequence for you but she did basically day labor.

COURT: Excuse me, sir, what is United Care?

A. It is a nursing home that is now called Modern Care located out near K-Mart, behind the K-Mart building.

Q. Mr. Jacobson, I'd like to ask you about your motion that you filed on March 14, 1978. I'll show you what has been marked for identification as defendant's five and ask if you can identify that?

A. Yes sir.

Q. What is it?

A. It is a motion to have the defendant evaluated.

Q. Now, was this made, this is a record in the trial of Margie Velma Barfield, is that right?

A. Yes.

Q. Now, did you ask for any relief from Dorothea Dix other than that which is set out in this motion?

MR. BRITT: Well, OBJECT to the question.

COURT: If you understand it, OVERRULED, you may answer

it already bears defendant's exhibit number 27 identifying number; the remaining paper still under the same staple are handed back to Mr. Little who hands them back to the Clerk in the presence of the defendant.

Q. Mr. Jacobson, I ask you if you can identify Defendant's exhibit number 27?

A. Yes.

Q. Is that the report that you said that Dr. Rollins furnished you concerning Velma Barfield?

A. Yes sir.

Q. Did you receive any other written information from Dorothea Dix or Dr. Rollins concerning Velma Barfield?

A. I don't believe so.

Q. Did you request anything other than that, what you have in your hand?

A. I talked to him on several occasions. I don't think I requested anything further in writing.

Q. Did you see any, look at any charts of Mrs. Barfield or reports of any other persons relating to her while you were at Dorothea Dix?

A. I don't think I did. No, I did not.

Q. Can you tell us what your basic conversation was with Dr. Rollins at the time that you went to see him when Velma Barfield was at Dorothea Dix?

A. Yes, Dr. Rollins felt like the patient was being uncoopera-

tive, that there was nothing that could explain her condition, her lack of memory except that she was doing it willfully and he says I've got nothing for you. He says, "If you can get her to cooperate with me, perhaps there might be something I can do for you." but he said that he was having a problem, and I spoke to her about this and it was for this reason that he recommended another psychiatrist talk to her, that they were just having a problem with communicating, and that he didn't feel like she was coming across as well as she ought to.

Q Do you know what day you talked to Dr. Rollins, do you know what day that was?

A On the 21st day of April, 1978.

Q And do you know when she was returned from Dorothea Dix?

A I know that I had a telephone conversation with regard to her return from Dorothea Dix on April the 25th. I don't know if that was the exact date she returned or not.

Q Is the date of discharge reflected in the exhibits you have?

A No, it says date of admission March 15, date of conference April 21, date of discharge blank. There is nothing there.

Q Okay, now, was it your intention,---Strike that. You asked Dr. Rollins to testify at trial, is that correct?

A Yes sir, I did.

Q Were you aware as to the results of any testing done on

MR. BRITT: OBJECT.

COURT: OVERRULED.

A What do you mean?

MR. BRITT: Well, I OBJECT to all that.

COURT: OVERRULED.

Q Were you informed at Dorothea Dix by Dr. Rollins or any of his associates of the physical condition of Velma Barfield during the period that she was at Dorothea Dix?

MR. BRITT: OBJECT.

COURT: In the discretion of the Court, OVERRULED. What is your answer?

A I may have been advised not necessarily by Dr. Rollins but by Mrs. Barfield that she was having some trouble sleeping.

MR. BRITT: MOVE TO STRIKE.

COURT: DENIED.

Q What was your purpose in using Dr. Rollins as a witness at trial?

A I thought perhaps using all three psychiatrists and some members of the family that I might be able to introduce a psychiatric defense. Ultimately it worked out that the Court would not consider it and would not submit it to the jury, but as a secondary purpose, and I don't mean to imply that it is any less important, I wanted to offer Dr. Rollins and the other psychiatrists in mitigation and extenuation.

Q Did you talk to Dr. Rollins about him testifying in mitigation and for Velma Barfield?

A I talked to Dr. Rollins about him testifying and I wanted him to relate everything he could about the patient.

Q Did you talk to him specifically about him testifying in the sentencing phase of the case?

A I don't believe I differentiated between the guilt or innocence phase and the sentencing phase. I know I talked to him about testifying, period.

Q Now, did Dr. Rollins tell you that in his opinion she was, she knew the difference between right and wrong at the time the crime was committed?

A He told me that.

Q Did he tell you that in his opinion she was ready, competent to stand trial?

A He told me that.

Q You entered a plea of not guilty by reason of insanity in this case, did you not?

A I entered a plea of not guilty and not guilty by reason of insanity. I think that is the way you are supposed to make the plea in that situation.

Q And did you consider,---Did you ask Dr. Rollins to testify in the sentencing phase?

A I asked him to testify.

Q In the sentencing phase?

A I asked him to testify at the trial.

Q Did you ask him to testify as to any particular phase?

MR. BRITT: OBJECT.

COURT: OVERRULED.

A Even though we had a bi-furcated trial, a two-part trial, the first part can be considered in the second part, and I knew this and it didn't really matter where he testified, that it was going to be considered. So I asked him to testify.

Q Now, you asked Dr. Sainz to testify also, did you not?

A Yes, I did.

Q Did you have any discussions with Dr. Sainz prior to the trial concerning Velma Barfield?

A Yes, I had several.

Q Did you have conversations with him concerning Dr. Sainz testifying as to her knowing right from wrong at the time of the offense?

A He had told me that she knew right from wrong and that under the legal definition of insanity she was not insane.

Q Did he tell you that he did not believe in insanity?

MR. BRITT: OBJECT.

COURT: OVERRULED.

A Well, it's hard to remember at this late date but ---

MR. BRITT: OBJECT. The transcript speaks for itself, Your Honor.

COURT: OVERRULED.

A He may have and he may not have; I don't recall.

Q Now, what was your purpose in using him in the guilt phase?

A Again, I'd have to give you the same answer as I gave you before. I knew that all three of the psychiatrists were going to say that she did not meet the legal test of insanity and that she was competent to stand trial but from their testimony I felt like perhaps by some chance I could develop a psychiatric defense; at least I hoped I could. I did want them to testify as to her use of prescription drugs. In each of the reports, Mrs. Barfield had told at least Dr. Rollins and Dr. Douglas that she didn't mean to kill Stewart Taylor, I wanted this to come out, and it did come out. The purpose of that would be to have the jury convinced that she committed a second degree rather than a first degree murder and then lastly I wanted all of their testimony to be considered on mitigation and extenuation should she be convicted of first degree murder.

Q Now, Dr. Douglas also testified, did he not?

A Yes, he did.

Q Did he tell you prior to trial that he believed that she knew the difference between right and wrong at the time of the offense?

A Yes, he did.

Q And did he tell you that he thought she was competent to stand trial?

A He told me that she was as sane as, he said, "She is as sane as you and I." I don't know if that is any test or not but that is what he told me.

Q What did Dr. Rollins or Dr. Douglas or Dr. Sainz, all three, tell you prior to trial that led you to believe you could establish a defense of insanity in this case?

MR. BRITT: OBJECT to form.

COURT: OVERRULED.

A My purpose was to show that each had diagnosed her as having some sort of mental illness. They placed a label on her condition. Even though each of them had said that in their opinion she knew the difference between right and wrong and that she was capable of standing trial, I thought perhaps through their testimony that she did have some problems psychiatric in nature that I could use those in combination to build a psychiatric defense. Considering her drug abuse and considering her treatment in the past by psychiatrists I seriously thought that I would be remiss in not introducing testimony from all three of them.

Q Did you,---Why did you use all three of them in the guilt phase as opposed to the sentencing phase?

A Because everyone of them except Dr. Sainz had said that she told them, "I didn't mean to kill him" and this would corroborate her confession that she didn't mean to kill Stewart Taylor thereby perhaps reducing the crime from first degree

to second degree murder. That was a very important part of having them testify on the guilt or innocence phase of the trial.

Q Is there a reason that you did not put them on for the limited purpose during the guilt phase of establishing what Mrs. Barfield had told them about her intent and using the rest of their testimony in the sentencing phase?

MR. BRITT: OBJECT.

COURT: In the discretion of the Court, OVERRULED.

A Under the bi-furcated trial system that we had, the matters considered in the, or testified to in the guilt or innocence phase are considered in the sentencing portion and I tried to get everything I could out of them knowing that it would be considered. I saw no purpose in dragging it out and having them testify on two different occasions. It hard enough getting them to trial at one time,much less two.

Q Was Mrs. Barfield on medication at the time of trial?

MR. BRITT: OBJECT. Medical conclusion on his part.

COURT: If he has absolute knowledge he can give an absolute answer. OVERRULED.

A She may have been ---

MR. BRITT: OBJECT AND MOVE TO STRIKE.

COURT: SUSTAINED as phrased both by question and answer.

MR. BRITT: MOVE TO STRIKE.

in the penalty phase, what did you, what was your intention?

MR. BRITT: OBJECT.

COURT: Have you finished your question?

MR. LITTLE: No sir, I am in the middle of it. I decided you were going to sustain the objection and I was just trying to re-word it.

COURT: Go to a new question.

MR. LITTLE: Yes sir.

Q Mr. Jacobson, in the sentencing phase, were there any witnesses that you intended to call other than those that were called?

MR. BRITT: OBJECT.

COURT: OVERRULED.

A Those were the witnesses that I intended to call that I did call.

Q Mr. Jacobson, why didn't you call any witnesses that grew up with Velma Barfield in the Parkton area?

MR. BRITT: Well, I OBJECT.

COURT: SUSTAINED.

Q Were you aware of any witnesses that knew Velma Barfield that could testify as to her background prior to the time that she used drugs?

MR. BRITT: OBJECT.

COURT: OVERRULED.

A I had gotten together with the family and we had made the

decision, and it was my decision with their consent, with the defendant's consent, that we would concentrate on her drug abuse and present the case in a fashion to show that she was all right up until the time her first husband died and that from there it was downhill. There was never a suggestion to me and it was never my intention to go 'way, 'way 'way back and get people in the Parkton area, and this decision was made by me with her consent.

Q Do you know when she moved from Parkton?

MR. BRITT: OBJECT.

COURT: OVERRULED.

A I really have no idea. I know she moved around from there to Fayetteville and may have been in Columbus County but I can't recall at this time exactly what dates she moved from where.

Q Did you consider, were you aware,---Strike that. Did you talk to anyone in the jail here in Robeson County about testifying for Velma Barfield in the sentencing phase?

A I may have.

Q Who is that?

MR. BRITT: Well, OBJECT.

COURT: In the discretion of the Court, OVERRULED.

A Well, the subject was not brought up by me to people in the jail, it was brought up to me by the people in the jail. They are the ones who came to me and said that she had been

talking to them about testifying and they said considering their position and everything they didn't think it would be appropriate and I agreed.

Q Who was that that said that to you?

A I believe it was Austin George.

Q Anybody else?

A There was a matron over there and I don't recall her name at that time. I don't know that she talked to me about it or not. I think the conversations I had were with Austin George.

Q What kind of image were you trying to portray of Velma Barfield to the jury in the sentencing phase?

A A sympathetic motherly image. That was throughout the trial, and I believe I failed.

MR. LITTLE: Your Honor, I think we are through. Let me make sure.

COURT: I'll give you time to confer there.

(Mr. Little and Mr. Burr confer)

MR. LITTLE: Your Honor, we have no further questions at this time. Thank you, Mr. Jacobson.

COURT: Very well, it is now lunch time. Let cross examination begin after lunch. We will come back today at 2:15. Take a recess until then, Mr. Sheriff.

(The Court takes a lunch recess until Tuesday Afternoon, November 18, 1980, at 2:15 P.M. Upon the re-convening of Court, the following proceedings are held,)

that correct?

A Yes, on April 11, 1979. It's got the file stamp on it.

Q Now, Mr. Jacobson, during the direct examination, you made the statement that you couldn't enter a guilty plea in a first degree case. Would you explain what you meant by that, please?

A I think that I said that in frustration more than anything. I think that what I mean that I wouldn't consider entering one in this case and I had no intentions of entering one because she said ---

MR. LITTLE: OBJECTION.

COURT: OVERRULED.

A She said she didn't mean to do it.

Q All right. Had you been in a position to enter a guilty plea, would that, would you by a guilty plea have been able to escape exposure to a death verdict?

A No sir.

Q You also indicated on direct examination that you attempted to portray the defendant as a sympathetic motherly person but that this was unsuccessful. Those may not be your exact words but your testimony was in that vein. What did you mean by that? Why do you say that it was unsuccessful?

A Well, I indicated on direct examination that I failed; I should have said the attempt failed. What I meant was that I counseled her on many occasions to give the appearance of

being sympathetic and motherly and to cry if she could and to elicit the jury's sympathy, and she would not do it or did not do it. She, on cross examination, she got into a fight with the District Attorney and started arguing and several times she got called down from the bench for arguing and the Court asked her just to answer the question and at the end of the District Attorney's argument ---

Q You are talking about jury argument, now?

A The jury argument. I think it was on the case in chief. It was brought to my attention that she had applauded the District Attorney's argument, that she had raised her hands up and simulated a clap without actually making any noise, but in my opinion making a spectacle of herself and I repremanded her severely for this.

Q What was her general demeanor on the Stand when you had her on direct examination? Did she appear to be a sympathetic person or otherwise?

A Well, she was, she came across more on cross examination as being somebody who wanted to argue rather than somebody that wanted sympathy. She was not on direct so sympathetic as to want to say, well, gee, I'm sorry for what I've done and I want forgiveness, this sort of thing. She didn't give that impression. Like I say, I tried to encourage her to appear sympathetic, to get sumpathy from the jury, I wanted. the jury to think of the defendant like they would think of

their own mother.

Q Did she ever at any time during the course of the trial, either in phase one or phase two, demonstrate any remorse or contrition for the crimes that she was accused of?

MR. LITTLE: OBJECTION.

COURT: SUSTAINED as phrased.

Q All right, sir. Did she cry at any time?

A No sir.

Q Did she display remorse at any time?

A No sir.

MR. LITTLE: OBJECTION.

COURT: SUSTAINED.

MR. LITTLE: MOVE TO STRIKE.

COURT: ALLOWED.

MR. BRITT: Your witness. Take the witness.

COURT: Any re-direct?

MR. LITTLE: Yes, Your Honor.

RE-DIRECT EXAMINATION BY MR. LITTLE:

Q Mr. Jacobson, you say that you didn't enter a guilty plea because she didn't want to, is that what you said?

A It was her feeling that she had not intended to do this and therefore we had a good shot at second degree. Yes, she probably would have entered a plea of guilty pursuant to a plea bargain but that, entering an open plea and pleading guilty pursuant to a plea bargain are two different things,

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